Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

JOAN H. COX, Individually, and as Widow and Personal Representative of the Estate of Brian J. Cox, deceased; and as Mother and Legal Guardian of Brian Justin-Tyler Cox, a minor,

Petitioner,

v.

COUNTY OF PRINCE WILLIAM; CHARLIE T. DEANE, Individually and as Chief, Prince William County Police Department; JAMES FORD, Individually and in his Official Capacity as a Police Officer; MARK J. HARMAN, Individually and in his Official Capacity as a Police Officer; ROBERT C. SHAUL, Individually and in his Official Capacity as a Police Officer,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to decisions of the Second and Third Circuits and contrary to this Court's decision in *Graham v. Connor*, the court of appeals erred in holding, as a matter of law, at the summary judgment stage, that the police acted reasonably in striking a homeowner asleep in his own bed, and then shooting and killing the homeowner when, confused and startled by the police officers' blow, he awakened suddenly, holding the gun that he had with him in bed.

LIST OF INTERESTED PARTIES

The parties to the proceeding below were Petitioner, Joan H. Cox, individually, and as widow and personal representative of the Estate of Brian J. Cox, deceased; and as mother and legal guardian of Brian Justin-Tyler Cox, a minor; defendant County of Prince William, Virginia; defendant Charlie T. Deane, individually and as Chief, Prince William County Police Department; defendant James Ford, individually and in his official capacity as a police officer; defendant Mark Harman, individually and in his official capacity as a police officer; and defendant Robert C. Schaul, individually and in his official capacity as a Lieutenant in the Prince William County Police Department.

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Petitioner Joan H. Cox, individually, and as widow and personal representative of the Estate of Brian J. Cox, deceased; and as mother and legal guardian of Brian Justin-Tyler Cox, a minor, by her undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 249 F.3d 295. The opinion of the district court (App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2001. On July 25, 2001, Chief Justice Rehnquist granted an application to extend the time within which to file a petition for a writ of certiorari to and including September 3, 2001 (a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in

such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (West Supp. 2000).

STATEMENT OF THE CASE

A. Introduction

This case arises from the tragic killing of a sleeping homeowner by police in Prince William County, Virginia. The homeowner was asleep in his own bed when police officers, called to the scene by a neighbor who had heard the sound of breaking glass, entered the homeowner's bedroom and attempted to rouse the sleeping man. When shouting and the barking of a police dog failed, one of the officers, unreasonably and contrary to accepted police procedure, struck the homeowner on the foot. Startled and confused, the homeowner awakened suddenly, holding the rifle that he had with him in the bed. Two Prince William County police officers then opened fire, shooting the homeowner seven times and killing him immediately.

The legal issue presented is whether, in analyzing an excessive force claim against a police officer under § 1983, courts may strip the fact finder of its appropriate role by declaring as a matter of law the objective reasonableness of an officer's conduct, even in the face of evidence that would allow a reasonable juror to conclude that the force was excessive. Determinations of reasonableness typically are reserved for the finder of fact. That is no less so where the claim is one of excessive force under § 1983. The Fourth Circuit decided, however, as a matter of law, that it was reasonable for officers to strike a sleeping homeowner in his own bed, and thus set in motion an immediate sequence of

events that led to the homeowner's death. The courts of appeals have split on the issue of whether it is proper for a court to determine, at the summary judgment stage, the "objective reasonableness" of an officer's use of force, where there is evidence that would permit a reasonable person to find the force excessive. Petitioner respectfully requests that this Court grant review to resolve this important question, which will affect a large number of cases involving claims that a police officer used excessive force.

B. Factual Background

1. The December 11, 1997 shooting of Brian Cox.

Brian Cox and his wife, Joan, returned home from a company Christmas party on the night of December 11, 1997. Arriving at their residence, the couple argued. Mrs. Cox drove the car to a friend's house, taking with her the only set of keys to the Cox townhouse. Unable to enter the house through the locked front door, Mr. Cox went to the rear of the home and entered by climbing onto a deck on the second level of the house, and then breaking a rear window. Mr. Cox undressed and proceeded up the stairs to the couple's bedroom, where he fell asleep. Pet. App. 4a.

A neighbor who heard the sound of glass breaking called the police. In response, the police dispatcher sent out a radio alert for a suspected burglary in progress. Prince William County police officers Mark Harman and Nathan Jones responded to the alert and were the first officers to arrive on the scene. Prince William County officer James Ford and his "K-9 unit" (*i.e.*, a police dog) also responded. Pet. App. 4a-5a. Shortly thereafter, Prince William County Lieutenant Robert Schaul arrived. Although the other officers were deciding what to do, Lieutenant Schaul did not get out of his

car and did nothing to direct or guide the officers' planning. JA 747-49.[1]

To gain access to the house for the K-9 unit, Harman and Jones climbed onto the deck, and, after entering through the same window broken by Mr. Cox, unlocked the door from the inside. Pet. App. 5a. Before entering the house, Ford shouted three "Police K-9" warnings at intervals of fifteen to forty seconds. JA 824. Ford and Harman were concerned that the homeowner might be inside, because they had been informed that the residents normally were at home at that time of night. JA 261, 784-85, 825-26. Hearing no response to his warnings, Ford entered with his police dog, followed by Harman and Jones. Pet. App. 6a.

As the officers entered the townhouse, Jones assumed a position at the top of the stairs leading to the basement, and Harman and Ford searched the main floor. The coat and other clothing that Mr. Cox removed after entering the house were in plain view on the main floor. Pet. App. 6a; JA 76, 212, 827. After searching the main level, Ford decided to go upstairs to check for "children or any other people who were supposed to be inside the house." JA 825, 843. At the top of the stairs, Ford could see that one of the double doors to the main bedroom was open, and he asked Harman to shine his flashlight into the room. JA 829. Harman did so and could see a man lying on his left side facing the door on a slight diagonal across the mattress. The man was Brian Cox, asleep in his own bed. Pet. App. 6a. Ford gave additional "Police K-9" warnings at the top of the steps, but received no reply from Mr. Cox. JA 791-92.

Ford then entered the bedroom with the dog and with his gun drawn. Ford and his dog took a position on the left side at the foot of the bed within a few feet of Mr. Cox's head, while Harman positioned himself on the right side, near Mr.

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[1] "JA" refers to the Joint Appendix in the court of appeals. A copy of the Joint Appendix has been lodged with the Clerk of this Court.

Cox's feet. JA 212-13. Mr. Cox was wearing a white t-shirt and boxer shorts. Pet. App. 6a. Most of his body, including his feet, was uncovered. According to the officers, the bedcovers were "balled up" at the end of the bed and covered Mr. Cox's right hand. JA 831. Mr. Cox was sleeping on his left side and his left hand was underneath him. JA 213. To Ford, it appeared that Mr. Cox was "passed out and sound asleep." JA 832. Harman, noticing a beer can on the end table, thought that perhaps Mr. Cox was not responding because he was drunk. JA 792, 798.

Ford holstered his gun and gave another warning. Again, Mr. Cox did not respond. JA 831-32. The police dog barked near Mr. Cox's head. Pet. App. 6a. Apparently frustrated by the lack of response from Mr. Cox, Harman struck Mr. Cox's foot with his flashlight in an attempt to rouse him. JA 214, 795, 832. Harman took this action after being in the room for only ten to twenty seconds. JA 431. Harman later explained his action by saying that he thought that "talking to him was not getting us anywhere." JA 430. Ford stood by, watching Mr. Cox while Harman struck his foot. JA 832.

Immediately after Harman made contact with his foot, Mr. Cox awoke screaming. JA 796. Mr. Cox appeared "wide-eyed" and looked "startled" at having been roused from sleep. JA 832-33. Ford drew his weapon. As Mr. Cox awoke, he began pulling a .22 caliber rifle from underneath the covers with his right hand. Ford yelled for Mr. Cox to put his hands up and the dog began barking, but as Mr. Cox continued to rise from the bed, Ford began to shoot. Harman also began shooting at Mr. Cox. Harman and Ford shot Mr. Cox seven times, killing him almost instantly. JA 240-43, 796-97, 832-33. Directly after the shooting, Harman made several statements to the effect that he hoped that the person lying dead on the floor was not the homeowner. JA 855-57.

As part of the Prince William County investigation into the events surrounding the shooting, the Use of Deadly Force

Review Board and the Assistant Chief for Operations for the Prince William County Police Department criticized Lieutenant Schaul's complete lack of supervision at the scene. JA 873, 922-23. Though present throughout, Schaul stood by and did nothing. In particular, he took no steps toward creating a plan of action that would have been better suited to preventing the use of deadly force. JA 247-49.

2. Factual disputes, and inferences that must be drawn in petitioner's favor, regarding the blow to Mr. Cox's foot.

Although most of the facts in this case are undisputed, the parties put forth different versions of the crucial events involving Harman's blow to Mr. Cox's foot. Of course, in opposing respondents' motion for summary judgment, petitioner was entitled to have all reasonable inferences from the evidence drawn in her favor. Construing the facts in the light most favorable to Mrs. Cox, Harman aggressively struck Mr. Cox's foot with enough force to cause tissue damage. Expert analysis indicated that the large bruise and swelling found on Mr. Cox's left foot and noted by petitioner's investigators during the autopsy is consistent with a hematoma due to a blunt impact directed to the top of Mr. Cox's foot. JA 470, 653. Corroborating this physical evidence, Harman himself acknowledged, in his first interview with the Prince William County investigator after Mr. Cox's death, that he made physical contact with Mr. Cox's foot. JA 795. In his own interview, Ford confirmed repeatedly that Harman "touched" Mr. Cox. JA 832. In his later affidavit, Ford admitted that Harman may have "touched" Mr. Cox's foot with his flashlight. JA 214. These statements by the officers, admitting that Harman struck Mr. Cox and possibly struck him with his flashlight, combined with the physical evidence of Mr. Cox's injury and the expert conclusion that the injury was caused by blunt-force trauma, plainly constituted sufficient evidence for a jury to find that

Harman struck Mr. Cox with substantial force and that that sharp blow was the catalyst for the events that led to Mr. Cox's death.

The permissibility of this inference is enhanced by the discrepancies in the officers' testimony regarding Harman's blow to Mr. Cox's foot. In his first interview after the shooting, Harman admitted in no uncertain terms that he made physical contact with Mr. Cox's foot, stating that he reached out and "tapped" the exposed foot. JA 795. In his deposition almost a year and a half later, Harman stated that he could not recall whether or not he made contact with the foot. JA 430-31. In Harman's recent affidavit, which he provided after Mrs. Cox's expert testimony and the photos of the bruise on Mr. Cox's left foot became available, he again changed his story, saying that he did not recall making contact with Mr. Cox's foot, but that, if he did, he touched the bottom of his right foot. JA 223.

Similarly, although Ford initially confirmed to Prince William County Detective Watson that Harman "touched" Mr. Cox's foot, Ford stated in his deposition that he did not know whether or not Harman had actually touched Mr. Cox. JA 665-66, 832. Ford admitted, however, that Harman might have reached out to "touch" Mr. Cox with his flashlight. JA 269. Ford's most recent statement again acknowledges that Harman may have touched Mr. Cox on the foot with his flashlight. JA 214. The inconsistencies in the officers' testimony increased the likelihood that a reasonable finder of fact would draw the inference that Harman struck Mr. Cox's foot with his flashlight with enough force to cause Mr. Cox to wake suddenly from his sleep and to cry out, even though loud police commands had produced no response.

Harman's past problems with truthfulness and excessive force made such an inference even more likely. Harman was suspended without pay for thirty days for using excessive force when he verbally abused and then attacked a helpless,

handcuffed detainee, Michael John Dreischer. Harman initiated this incident and had to be pulled off of Dreischer by a fellow police officer. JA 878-83, 887-97, 901-03. Moreover, he made false statements to the department about the incident. JA 884-86. As part of his inquiry into these events, the investigating officer compiled a list of six incidents involving Harman that showed a tendency toward violent behavior (although in each instance Prince William County concluded that Harman's conduct was justified). For his attack on Dreischer, Harman was found guilty of violating Prince William County's General Orders on excessive force and knowingly making a false statement and misrepresenting facts. Initially, Prince William County officials recommended dismissal, but eventually Harman was only suspended for thirty days without pay. JA 878-97, 899, 901-03.

In a later incident, a Prince William County Sergeant complained that Harman ruined an ongoing investigation of a serial rapist, when Harman charged onto the scene and arrested the suspect before any evidence could be gathered. JA 910, 916-19. The Sergeant running the investigation stated that Harman became "extremely excited" when he thought he had "cracked the case," but when informed that he had ruined the investigation, "he began changing his explanations." *Id.* Another of Harman's supervising officers accused him of making less than truthful statements when he called in sick even though he was not physically ill. JA 433-35. Given Harman's record of untruthfulness, his history of using excessive force, and his admission that he struck Mr. Cox's foot, as well as the physical evidence in the record, petitioner was entitled to an inference, at the summary judgment stage, that Harman caused the bruise and swelling on Mr. Cox's foot by striking him while he lay sleeping.

Based on such an inference, a reasonable juror could have concluded that the officers did not choose a reasonable course of action in striking Mr. Cox's foot while he slept in his own

home. Petitioner presented expert testimony that Harman and Ford violated accepted police procedures and used excessive and unreasonable force in striking Mr. Cox's foot when he presented no threat. The testimony described the "cover and control" method as an example of a reasonable alternative course of action that would have secured Mr. Cox but significantly lessened the potential for the use of deadly force. JA 540-63, 605, 607-13. On this basis, a reasonable juror could have concluded that the officers' chosen course of conduct was objectively unreasonable.

C. Procedural History

1. Proceedings in the district court.

Invoking the court's federal question jurisdiction under 28 U.S.C. § 1331 and § 1343, petitioner filed this action in the United States District Court for the Eastern District of Virginia. As pertinent here, she asserted claims under 42 U.S.C. § 1983, alleging violations of Mr. Cox's constitutional rights by Prince William County, its police chief Charlie Deane, Schaul, Harman, and Ford. She also asserted common law tort claims for wrongful death and assault and battery.

Defendants moved for summary judgment on June 30, 2000. In response, petitioner argued that the officers' use of force was excessive, because the officers struck Mr. Cox while he slept and posed no threat, and then, having startled him awake, shot him as he rose reflexively with his hands on his rifle. JA 308-15. In a Memorandum Opinion and Order dated August 3, 2000 (App. B), the district court granted defendants' motion in all respects. The court's opinion was copied almost entirely from defendants' summary judgment briefs. Rife with errors of all sorts (including referring to Harman and Ford by the names of police officers in a cited case), the opinion shows that the court did not even bother to alter defendants' submission to refer to what plaintiff actually

did argue instead of what she "will contend." Pet. App. 27a. The court ruled that Harman and Ford were protected by qualified immunity. *Id.* at 23a. The court focused almost entirely on the fact that, when he was awakened, Mr. Cox arose holding a rifle. In the district court's view, that fact rendered all other facts immaterial and justified the use of deadly force. *Id.* at 17a-23a. Failing to accord Mrs. Cox the inferences to which she was entitled regarding Harman's blow to Mr. Cox's foot, the court also stated, again copying from defendants' brief without further discussion, that there was no evidence that any unconstitutional conduct had occurred before the appearance of Mr. Cox's rifle. *Id.* at 20a.

The court dismissed the constitutional claims against the county, Schaul, and Deane, because it held that no underlying constitutional violation had occurred. Pet. App. 23a. The court also held that Mrs. Cox had not adduced facts sufficient to support her inadequate supervision and failure-to-train claims against Schaul, Deane, and Prince William County under § 1983. *Id.* at 23a-24a. Finally, ignoring the facts in the record regarding the blow to Mr. Cox's foot, and failing to construe these facts and draw all reasonable inferences in favor of Mrs. Cox, the court ruled that the officers were not negligent in any way and therefore dismissed the counts of wrongful death, battery, and assault. *Id.* at 27a-28a.

2. Proceedings in the court of appeals.

The court of appeals affirmed, holding that the officers' conduct did not violate the Fourth Amendment's protection against excessive force. The court of appeals observed that its decision rested solely on the conclusion that no constitutional violation occurred, and therefore did not address the issue of qualified immunity or its relationship to the constitutional inquiry. *Id.* at 4a n.*, 11a. Citing this Court's test of "objective reasonableness" in *Graham v. Connor*, 490 U.S. 386, 395 (1989), the court held that Ford

and Harman had reason to believe that Mr. Cox posed a threat of serious physical harm and that the officers acted reasonably in self-defense. Pet. App. 9a.

In addressing petitioner's argument that a reasonable juror could find the officer's conduct in striking Mr. Cox's foot unreasonable, and thus also could find the subsequent use of deadly force unreasonable, the court of appeals assumed that Cox had a bruise on the top of his left foot, but ignored the factual dispute regarding the force of Harman's blow, his conflicting statements, his lack of credibility, and the expert testimony regarding reasonable alternative actions. Noting that Mr. Cox had failed to respond to the officers' shouts and that he "may have been sick or even dead," the court ruled that Harman's use of force was reasonable as a matter of law. Pet. App. 10a-11a.

Thus, the court on its own, in circumstances where a reasonable juror could have disbelieved the officers' testimony and found that their conduct was unreasonable, dictated the answer to the "objective reasonableness" issue without any reference to the factors articulated in *Graham* that govern this decision and without any reference to what a reasonable juror could infer from the evidence. Instead, the court brushed the issue aside, saying that "we simply cannot conclude that striking Cox on the foot to provoke a reaction was unreasonable under the circumstances." Pet. App. 10a. The court affirmed the district court as to the remaining counts against the supervisors and Prince William County, solely on the ground that no underlying constitutional violation had occurred. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

Although petitioner adduced evidence on the basis of which a reasonable factfinder could have found that the officers' use of force was unreasonable and excessive, the courts below decided the "objective reasonableness" of the officers' conduct as a matter of law at the summary judgment

stage. This was serious error. The Fourth Circuit's decision dramatically alters the appropriate division of responsibility between judge and jury in § 1983 cases under the Fourth Amendment. The ruling thus deprives the community in which police officers operate of any role in assessing the objective reasonableness of their conduct. Instead, it permits a judge to declare for the community at large what conduct will considered "reasonable" or "unreasonable," even where a reasonable person could find the use of force unreasonable and excessive. The Fourth Circuit's decision thus conflicts with rulings in other circuits that more appropriately circumscribe the role of judges in determining reasonableness in excessive force cases. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 289-90 (3d Cir. 1999); *Breen v. Garrison*, 165 F.3d 152, 153 (2d Cir. 1999). This Court should grant certiorari in this case to resolve this fundamental and important issue: Where a reasonable person could find that an officer's conduct was objectively unreasonable, does the jury or the court decide whether police conduct constitutes excessive force under the Fourth Amendment?

The Fourth Circuit's Decision to Take the "Objective Reasonableness" Determination Away From the Factfinder in a Case Where a Reasonable Person Could Conclude that an Officer Used Excessive Force Conflicts With the Decisions of Other Circuits.

Recognizing the principle that the factfinder is best suited to the make the reasonableness determination under the Fourth Amendment, the Second and Third Circuits have specifically held that the issue of objective reasonableness is for the factfinder where a reasonable juror could believe that an officer used excessive force. *See Breen*, 165 F.3d at 153; *Abraham*, 183 F.3d at 289-90. Other circuits have reached similar results without expressly addressing the issue.[2] These

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[2] *E.g., Clash v. Beatty*, 77 F.3d 1045, 1047-48 (7th Cir. 1996) (dismissing appeal from denial of summary judgment where factual disputes

decisions are consistent with the nature of the objective reasonableness inquiry outlined by this Court in *Graham v. Connor*, 490 U.S. at 394-99. In vacating an earlier decision of the Fourth Circuit, this Court set forth the ground rules governing § 1983 claims in which officers are alleged to have used excessive force when making a "seizure" of a free citizen. *Id.* *Graham* held that all such claims, whether or not they involve deadly force, must be analyzed under the Fourth Amendment and its "reasonableness" standard. *Id.* at 394. The "reasonableness" inquiry in an excessive force case, this Court explained, "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

As *Graham* explained, the Fourth Amendment "objective reasonableness" inquiry in excessive force cases "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." 490 U.S. at

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regarding police officer's use of force and whether it was excessive under the circumstances precluded the court from determining as a matter of law that the officer's conduct was objectively reasonable); *St. Hillaire v. City of Laconia*, 71 F.3d 20, 24 n.1 (1st Cir. 1995) ("While this court has not had the occasion to explore fully the allocation of functions between judge and jury where facts relevant to the immunity defense are in dispute, we have said that 'we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat'") (quoting *Prokey v. Watkins*, 942 F.2d 67, 72 (1st Cir. 1991)).

Before this Court's recent decision in *Saucier v. Katz*, 121 S. Ct. 2151 (2001), many courts of appeals treated as one and the same the question of whether a constitutional violation had occurred and the issue of whether the officer involved was entitled to qualified immunity. *See, e.g., Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). *Saucier* holds that those issues are distinct and must be treated separately. This Court's decision, however, does not undermine prior rulings by the courts of appeals regarding the allocation of responsibility between judges and jury in determining the "objective reasonableness" of police conduct.

396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). This Court stressed that the reasonableness of an officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," taking into account that officers often are forced to make split-second decisions, in uncertain situations, regarding the amount of force that is necessary to make an arrest. *Id.* at 396-97. The *Graham* court cautioned, however, that

> because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. Thus, in *Graham*, this Court highlighted the fact-intensive nature of the "objective reasonableness" inquiry and provided examples of the more important facts that should be examined to determine the reasonableness of officer conduct.

Following *Graham,* the Third Circuit in *Abraham v. Raso* held that the reasonableness inquiry should be left to the jury in most cases, correctly observing that "reasonableness under the Fourth Amendment resembles tort law in its attention to how a specific, concrete circumstance should affect an officer's judgment." 183 F.3d at 289-90. The court explained that this kind of determination is one particularly suited to jury resolution due to the "sensitivity to context" inherent in the Fourth Amendment "objective reasonableness" inquiry.

> [R]egardless of whether objective reasonableness invokes a different and heightened standard from negligence, reasonableness under the Fourth Amendment should frequently remain a question for the

> jury. To put the matter more directly, since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of "reasonableness" is itself reasonable and widely shared.

Id. at 290. Further, the Third Circuit addressed the question, squarely at issue in this case, of "how willing district courts should be to find a use of force objectively reasonable assuming a given set of facts," saying that "the answer depends on a court discerning differences in degree familiar in evaluating factual questions on summary judgment." *Id.* In other words, courts should view the "objective reasonableness" inquiry in the same manner that other issues are viewed on summary judgment—where a reasonable mind could believe that certain conduct was unreasonable, the issue should be determined by the factfinder.

Under this standard, the Third Circuit in *Abraham* allowed the factfinder to determine the reasonableness of an officer's conduct where there was enough physical evidence to cast doubt on the "uncontradicted" officer testimony. In *Abraham*, an officer shot and killed a suspected shoplifter as he attempted to drive out of a store parking lot. Although all of the officers on the scene testified that the victim recklessly backed out of a parking space (damaging another car in the process) and attempted to run over the shooting officer who was standing in front of the vehicle, the physical evidence showed that neither the victim's car nor the car it struck were dented by the impact and that it was the driver's side window, rather than the front windshield, that was shot out by the officer. Further, there was conflicting evidence as to how much room the officer had in which to maneuver to avoid the victim's moving car. Analyzing this evidence, the court of appeals remarked dryly that "a jury might not believe the officers' testimony that Raso was simultaneously in front of the car, being struck by it, jumping out of the way, and firing

through the driver's side window." 183 F.3d at 294. The court properly allowed a jury to determine the reasonableness of the officer's conduct because a jury could infer from the physical evidence that the suspect was not driving as recklessly as the officers stated, that the officer shot through the driver's side window from the side of the car, where she was not in danger, and that she had room to avoid the vehicle, thus making her use of deadly force unreasonable. *Id.* at 293-95.

This guidance from *Abraham* is especially relevant where, as here, the only eyewitness other than the police officers is dead, significant witness credibility issues exist, and the physical evidence regarding the force of the blow delivered by Harman is in dispute. *See Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001); *Abraham*, 183 F.3d at 294; *Scott*, 39 F.3d at 915. In this case, as in *Bazan v. Hidalgo County*, "the evidence the [officer] claims is uncontradicted and unimpeached comes for the most part, if not exclusively, from an *interested witness*," *i.e.*, the officers who were involved in the killing. 246 F.3d at 492 (emphasis in original). Therefore, "the court may not simply accept what may be a self-serving account by the officer." *Abraham*, 183 F.3d at 294. Instead, "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.'" *Id.* (quoting *Scott*, 39 F.3d at 915). Thus in this kind of case, where the "defendant knows that *the only person likely to contradict him or her is beyond reach*," *Bazan*, 246 F.3d at 492 (emphasis in original), the court should look with particular care "at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably." *Abraham*, 183 F.3d at 294 (quoting *Scott*, 39 F.3d at 915).

Viewing the evidence in the light most favorable to petitioner, as the courts below were required to do, a reasonable juror could conclude based on the physical evidence and conflicting testimony that Harman used excessive force in striking Mr. Cox while he slept in his own bed. An expert has identified a bruise on Mr. Cox's foot that is consistent with blunt-force trauma, and Harman has admitted that he struck Mr. Cox because he felt that "talking to him was not getting us anywhere." Ford confirmed that Harman "touched" Mr. Cox's foot and added that Harman may have struck Mr. Cox with his flashlight. Further, Harman has offered conflicting testimony as to his contact with Mr. Cox, and he has been disciplined in the past for making false statements to the Prince William County police department regarding another instance of excessive force. Both officers admitted that numerous warnings from the police at the front door, at the top of the steps, and in the bedroom failed to wake the person sleeping on the bed. A reasonable jury could have found (a) that Harman's blow was forceful enough to rouse Mr. Cox screaming when all of the previous commotion had not caused any reaction whatsoever; and (b) that striking Mr. Cox's foot hard enough to cause a bruise while he lay on his bed asleep and not posing any threat was an excessive and objectively unreasonable use of force.

It is worth emphasizing that this was not a case in which officers were forced to make "split-second judgments" in "tense" and "rapidly evolving" circumstances. *Graham*, 490 U.S. at 397. To the contrary, the officers here confronted a static situation; Mr. Cox was sleeping so soundly that he did not respond to the officers' shouts or to a barking police dog. He posed no threat to the officers or others. Both Harman and Ford acknowledged that they were aware that the person on the bed could be the homeowner. This was, quite literally, an occasion on which the officers could have determined their course of action after "armchair reflection." Harman and the other officers could have sat down in armchairs and thought

about the best way to deal with the sleeping man, so as to minimize the potential for a sudden, startled, reflexive reaction with unpredictable consequences. Uncontradicted expert testimony on police procedures described the well-established "cover and control" technique for dealing with, and safely incapacitating, a sleeping or unconscious subject. But the officers failed to use that procedure. Instead, only a few seconds after entering Cox's bedroom, Harman elected to whack the homeowner on the foot with a heavy police flashlight. A reasonable jury could have found that this use of force was ill-conceived, excessive, and objectively unreasonable.[3]

The courts below arrogated to themselves the role properly reserved for the finder of fact. They thus prevented any jury from making the critical factual determination, after hearing and evaluating the evidence. This was error. It cannot be reconciled with the decisions of other courts of appeals that more appropriately allocate responsibility between judge and

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[3] If a jury were to find that the officers used excessive force by striking Mr. Cox's foot while he lay sleeping, then the officers' subsequent use of deadly force also would be constitutionally suspect. This Court has required that the factfinder examine the "totality of the circumstances" in assessing the reasonableness of an officer's use of force. *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. at 8-9). The officers' use of deadly force cannot be excused where their initial unconstitutional use of force in striking his foot provoked Mr. Cox's reflexive reaction. *See Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994); *cf. Sledd v. Lindsay*, 102 F.3d 282, 287-88 (7th Cir. 1996) (reversing grant of summary judgment on qualified immunity grounds where officers' failure to knock and announce caused victim to use gun). Moreover, even if Harman and Ford eventually were held to be protected by qualified immunity, Prince William County still could be held liable for the violation of Mr. Cox's Fourth Amendment rights. The Fourth Circuit's decision affirming summary judgment as to all defendants was based entirely on the conclusion that no constitutional violation occurred. Pet. App. 11a; *see Fletcher v. Town of Clinton*, 196 F.3d 41, 55 (1st Cir. 1999); *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992).

jury. As the Ninth Circuit wrote in *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), "[w]hile these factual conflicts concerning the sequence of events and the true nature of the threat confronting [the officer] might be resolved in [the officer's] favor at trial, it is neither our job nor the job of the district court to resolve these conflicts in the evidence on a motion for summary judgment." The court of appeals here neither explained, nor acknowledged the significance of, its seizing for itself the "objective reasonableness" inquiry.[4] Rather, the court in essence held *as a matter of law* that it is proper for officers to strike a person who is "passed out" or fast asleep and who the officers know could be the owner of the home in which he is found. The court stated that the officers did not know whether Mr. Cox was "sick or dead," but it did not explain why either condition would warrant a blow to the foot. Nor did the court offer any other explanation for why it was reasonable for Harman to hit Mr. Cox.

Tellingly, the court of appeals, in considering the initial blow delivered by Harmon, did not address any of the factors identified in *Graham* as relevant to excessive force claims. *Graham* directed courts to evaluate "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Here, it is undisputed that Mr. Cox posed no "immediate threat to the safety of the officers or others," and that he was not resisting arrest or attempting to

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[4] The Fourth Circuit's approach is comparable to that in *Williams v. Bramer*, 180 F.3d 699, 703, 705 (5th Cir. 1999)(holding, in qualified immunity context, that "objective reasonableness is a matter of law for the courts to decide, not a matter for the jury" and that the issue of "whether the alleged facts amount to a constitutional violation" is "solely a question of law"); and *Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001)(holding that the admittedly "fact dependent" reasonableness inquiry "is a *legal* determination")(emphasis in original).

flee. Although the officers thought they were investigating a possible burglary, the likelihood that the sleeping Mr. Cox was a burglar was slight, particularly given the lack of evidence that anything in the house other than the broken window was disturbed. Even the officers admitted that they knew the sleeping man on the bed might be the homeowner. Based on these facts and the expert testimony presented by petitioner, the officers had time to assess the situation and should have used alternative courses of accepted police procedure. This evidence was presented not simply to show that the officers violated accepted norms, but also to show that the officers ignored reasonable alternatives to their actions. These reasonable alternatives were especially appropriate in light of the officers' uncertainty regarding the identity of the man they observed in the bed.

Under the *Graham* factors and with all reasonable inferences drawn in petitioner's favor, a reasonable person could find that the officers used an objectively unreasonable amount of force by striking someone in Mr. Cox's circumstances. This Court should grant certiorari to clarify the proper role of the factfinder in the objective reasonableness inquiry under the Fourth Amendment and to make explicit that which is implied in *Graham*—that, in most circumstances, the factfinder, not the court, is best suited to gauge whether an officer's use of force was excessive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 4, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed May 16, 2001]

No. 00-2159
(CA-99-1880-A)

JOAN H. COX, ETC.,
Plaintiff-Appellant,

versus

COUNTY OF PRINCE WILLIAM, *et al.*,
Defendant -Appellees.

ORDER

The court amends its opinion filed May 4, 2001, as follows:

On page 8, first full paragraph, line 2—the phrase "as he lie sleeping" is corrected to read "as he lay sleeping."

For the Court—By Direction

/s/ Patricia S. Connor
PATRICIA S. CONNOR
Clerk

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2159

JOAN H. COX, Individually, and as Widow and Personal Representative of the Estate of Brian J. Cox, Deceased; and as Mother and Legal Guardian of Brian Justin-Tyler Cox, a minor,

Plaintiff-Appellant,

v.

COUNTY OF PRINCE WILLIAM; CHARLIE T. DEANE, Individually and as Chief, Prince William County Police Department; JAMES FORD, Individually and in his Official Capacity as a Police Officer; MARK J. HARMAN, Individually and in his Official Capacity; ROBERT C. SHAUL, Individually and in his Official Capacity,

Defendants-Appellees,

and

PRINCE WILLIAM COUNTY SHERIFF'S DEPARTMENT; PRINCE WILLIAM COUNTY POLICE DEPARTMENT; MARK HAMILL, Individually and in his Official Capacity as a Police Officer; JOHN DOES 1-10, Supervisors and Trainers at the Prince William County Police Department; JOHN DOES, 11-20, Individually and in their Official Capacities as Police Officers in the Prince William County Police Department,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Chief District Judge. (CA-99-1880-A)

Argued: March 1, 2001
Decided: May 4, 2001

Before KING and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Gregory wrote the opinion, in which Judge King and Senior Judge Hamilton joined.

COUNSEL

ARGUED: Patrick Michael Regan, REGAN, HALPERIN & LONG, P.L.L.C., Washington, D.C., for Appellant. Sharon Elizabeth Pandak, OFFICE OF THE COUNTY ATTORNEY, Prince William, Virginia, for Appellees. ON BRIEF: Thanos Basdekis, REGAN, HALPERIN & LONG, P.L.L.C., Washington, D.C., for Appellant. Gifford R. Hampshire, OFFICE OF THE COUNTY ATTORNEY, Prince William, Virginia, for Appellees.

OPINION

GREGORY, Circuit Judge:

Joan Cox, individually and as widow and personal representative of the Estate of Brian J. Cox, and as mother and legal guardian of Brian Justin-Tyler Cox, a minor ("Appellant"), appeals the district court's order granting summary judgment to the Appellees on her claims of

excessive force pursuant to 42 U.S.C.A. § 1983 (West Supp. 2000) and assault, battery, and wrongful death under Virginia law. In response to a neighbor's report that a burglary may have taken place at the Cox residence, the police searched the residence and discovered a man (later identified as Brian Cox) asleep in one of the bedrooms. After Cox awoke, pointed a previously concealed rifle at the officers, and failed to drop the weapon as ordered, the officers shot and killed Cox. Because we find that the officers' use of force was reasonable under the circumstances, we affirm the district court's order.*

I.

On December 12, 1997, the Appellant and her husband, Brian Cox had an argument after driving home from a party. After Cox struck the Appellant, she left with the keys and drove to a friend's house. Locked out, Cox proceeded to break into his home by breaking a rear window. Cox, who was intoxicated at the time, went straight to bed, taking a rifle to bed with him. The Appellant speculates that the rifle was for protection in light of the broken back window.

At approximately midnight, Adam Conrath, the Cox's next door neighbor, telephoned the Prince William County police to report that his wife had heard the sound of breaking glass at the Cox residence.

Conrath stated that a light inside the residence had then been turned off and that he saw that a window in the rear of the house had been pushed up. Conrath further reported that

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* Because we affirm the district court's order on the ground that the officers'use of deadly force did not violate the Fourth Amendment and decline to reach the issue of qualified immunity, we need not address the issue of whether the test for qualified immunity and the reasonableness test under the Fourth Amendment merge for purposes of our analysis. *See Saucier v. Katz*, __ U.S. __, 121 S. Ct. 480 (2000) (granting certiorari on, inter alia, the issue of whether the reasonableness inquiry merges when analyzing qualified immunity in an excessive force claim).

there was no car in the Cox driveway, which was unusual for that time of night.

The police dispatcher sent out an alert over the radio for a suspected burglary in progress. Officers Mark J. Harman and Nathan J. Jones responded to the call, arriving at approximately 12:05 a.m. Harman went to the front of the residence, a unit in a row of townhouses, and Jones approached from the back. At the back of the residence, Jones observed that the Venetian blind to one of the second level windows was disturbed or broken with a screen missing. Jones spoke or motioned to someone standing at the window of the Conrath residence and inquired whether anyone had exited the window; he received a negative response. Meanwhile, Officers Sandra J. Conlon and Stephen C. Mercer arrived on the scene. Conlon joined Jones at the rear of the residence and Mercer went to the front where Harman was stationed.

While waiting for a canine unit to arrive, Harman went back to his squad car and telephoned Communications and the Conrath residence in an attempt to obtain additional information about the residence, including the names of the residents. Although Harman attempted to obtain a telephone number for the residence, using both the address and the name Brian Cox, Communications was unable to locate the number.

Officer James Ford arrived with a police canine at approximately 12:30 a.m. Officers Harman and Jones climbed through the broken window in the rear of the residence and proceeded directly and quickly through the front door, leaving it open behind them. Before entering the residence to conduct a search with the canine, Jones and Ford noticed what they took to be broken automobile glass on the driveway of the Cox residence. Ford then stood at the entrance and shouted three identical loud announcements into the residence with pauses between them: "Police canine. Speak to me now or

I'll turn the dog loose!" After one of these announcements, Ford thought he heard movement inside the residence, but Harman believed the movement came from the Conrath residence next door. The warnings were heard by the Conraths from inside their townhouse and by a neighbor 100 yards away who came out to his front porch after hearing the warnings. Cox, however, did not respond to these announcements. Ford entered the Cox residence with his canine on lead, accompanied by Harman and Jones.

Jones stationed himself at the top of the staircase to the basement. After searching the main level, Harman followed Ford and his canine upstairs. Near the top of the stairs, Harman saw a man (later identified as Cox) lying on a bed in a room across the hallway from the stairs. Cox did not respond to additional police announcements made at the top of the stairs. The officers entered his bedroom with Ford maintaining the canine on lead. Both of the officers were dressed in uniform with identifying badges and markings.

Inside the bedroom, Ford and his canine remained at the foot of the bed, while Harman took up a position at the right side of the bed near the foot. According to the officers, Cox was lying on his left side with his left arm underneath him and his right arm extended in front of him with at least one of his hands concealed by the bedcovers. He was lying across the length of the bed, about three-quarters down from the head, on a slight diagonal, with his eyes closed, facing towards the bedroom door. Cox was wearing a white t-shirt and boxer shorts and remained motionless.

Ford testified that he yelled out "hey" in another attempt to get Cox to respond. After Cox failed to respond, Ford and Harman switched places—with Ford and the canine assuming a position at the right side of the bed. The canine was reportedly barking ferociously approximately one and a half feet from Cox's head. The officers testified that Harman slowly and methodically reached out to touch or tap the

bottom of Cox's foot in a continued attempt to rouse him. The Appellant, however, claims that Harman struck the top of Cox's left foot with a blunt object such as his flashlight, hard enough to leave a bruise.

Harman testified that he was studying the colored tattoo on Cox's right leg at this time when his attention was diverted by the sound of Ford yelling at Cox to put his hands up. Cox brought a rifle up from underneath the covers, pointing it in the direction of Ford and yelling "AHHHHHH." Ford removed his service weapon from its holster and started shooting at Cox. Harman, who already had his weapon drawn, also started shooting because he thought Cox was going to kill Ford. At least one of the shots went through Cox's right wrist, splitting the wooden stock of the rifle as he held it in a firing position. Jones came up the stairs and moved the rifle away from Cox's reach. Although the officers immediately called for an ambulance, the rescue crew determined that Cox was dead upon arrival.

The Appellant filed a complaint in the district court, alleging excessive force pursuant to § 1983 and assault, battery, and wrongful death under Virginia law. She named Prince William County, Police Chief Charlie T. Deane, Lt. Robert C. Shaul (the supervising officer on the scene), Ford, and Harman ("Appellees") as defendants. Finding that the officers were justified in their use of deadly force, the district court granted summary judgment to the Appellees and dismissed the case.

II.

We review a district court's grant of summary judgment de novo. *Higgins v. E. I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S.

317, 322 (1986). A material fact is in dispute when its existence or non-existence could lead a jury to different outcomes. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. *Id.* Mere speculation by the non-moving party cannot create a genuine issue of material fact. *Beale v. Hardy,* 769 F.2d 213, 214 (4th Cir. 1985). In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the non-moving party. *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996) (en banc).

A.

We first address whether the officers' use of deadly force was justified under the circumstances. The constitutional right at issue in this case involves the Fourth Amendment's prohibition against unreasonable seizures. The Supreme Court has held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989).

In assessing an excessive force claim under the Fourth Amendment, we apply an objective reasonableness standard: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. "A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (citing *Tennessee v. Garner,* 471 U.S. 1 (1985)). A reviewing court must keep in mind that "police officers are often forced to make split-second judgments—in circumstances that are

tense, uncertain, and rapidly evolving." *Graham,* 490 U.S. at 397. We must therefore judge reasonableness from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

In the case before us, the officers were investigating a suspected burglary in progress. They came across Cox while searching the residence and attempted to rouse him to ascertain his identity. It is undisputed that Cox unexpectedly sat up and pointed a concealed rifle at Ford. Ford immediately yelled something to the effect of "get your hands up, police." Harman confirmed that Ford gave Cox this verbal warning before they started shooting. Officers Jones, Conlon, and Mercer also heard the warning from where they were stationed. Although Conrath and his wife had retreated to the farthest corner away from the common wall between the residences, Conrath corroborates the officers' testimony by stating that they heard muffled yelling and then gunshots in rapid succession. It is undisputed that Cox failed to respond to this verbal warning. Further, based on the injuries to Cox's wrist, forearm, hip, and thigh on his right side as well as the damage to the rifle, First Sergeant Robert Zinn determined that Cox was "holding the rifle in a manner capable of being fired effectively." We believe that the officers had sound reason to believe that Cox posed a threat of serious physical harm.

B.

The Appellant, however, claims that Harman aggressively struck Cox's foot as he lay sleeping, an action that amounted to an unconstitutional use of excessive force as well as a violation of nationally accepted police procedures. The Appellant further claims that Cox's subsequent death was a foreseeable result of this alleged constitutional violation. Accordingly, she contends that the officers' actions as a whole were not objectively reasonable under the Fourth Amendment.

Because there was no eyewitness testimony at the scene other than the investigating officers, the Appellant presents very little evidence in support of her claim that Harman aggressively struck Cox's foot. The Appellant's strongest evidence is the existence of a bruise on the top of Cox's left foot. Although the bruise was not noted on the autopsy report, private investigators Larry Bailey and John Hickey were present at the autopsy and photographed the bruise. The Appellant's medical expert, Jack Daniel, reviewed the photograph and testified that the rounded bluish discoloration and slight swelling on Cox's foot "is consistent with a hematoma due to blunt impact."

Although the Appellees question the very existence of such a bruise, we take the facts in the light most favorable to the Appellant and assume that Cox had a bruise on the top of his left foot for purposes of our analysis. We find, however, that there is no evidence, beyond mere speculation, to suggest that Harman caused the bruise through the application of unconstitutional excessive force. Because the Appellant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another," *Beale,* 769 F.2d at 214, we find that she failed to present sufficient evidence to withstand summary judgment.

Moreover, even if Harman caused the bruise in an attempt to rouse Cox, we find that striking him on the foot under these circumstances was not an unconstitutional use of force. It is undisputed that Cox remained unresponsive even while a police canine ferociously barked less than two feet from his head. The officers had also made several loud announcements and failed to receive any response from Cox. For all the officers knew, Cox may have been sick or even dead. Faced with this situation, we simply cannot conclude that striking Cox on the foot to provoke a reaction was unreasonable under the circumstances.

C.

We therefore conclude that the officers' use of deadly force in response to an immediate and serious threat to their safety was reasonable under the standard set forth in *Graham v. Connor.* Upon waking Cox, it is undisputed that he rose from the covers and pointed a rifle directly at Officer Ford. "The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." *Elliott,* 99 F.3d at 643. Accordingly, we find that the officers' use of force was justified under the circumstances presented in this case. Because we find that there was no underlying constitutional violation, we find it unnecessary to reach the issue of qualified immunity.

III.

Because the officers did not commit any constitutional violation in using deadly force against Cox, we also find that the district court correctly granted summary judgment and dismissed the Appellant's claims against Lt. Shaul, Police Chief Deane, and Prince William County. "In the absence of any underlying use of excessive force.... liability cannot be placed on either the non-shooting officers, a supervisor, or the City." *Hinkle v. City of Clarksburg,* 81 F.3d 416, 420 (4th Cir. 1996).

IV.

For the foregoing reasons, we affirm the order of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-1880-A

JOAN H. COX, *et al.*,
Plaintiffs,

v.

PRINCE WILLIAM COUNTY, *et al.*,
Defendants.

MEMORANDUM OPINION

This case comes before the Court on Defendants Prince William County ("County"), Chief Charlie T. Deane, Lt. Robert Schaul (Ret.), Officer James Ford, and Officer Mark Harman ("Defendants") Motion for Summary Judgment.

Plaintiffs Joan H. Cox, individually and as widow and personal representative of the estate of Brian J. Cox, deceased, and as mother and legal guardian of Brian Justin-Tyler Cox, a juvenile, ("Plaintiffs") filed their first Complaint on December 10, 1999.

The Court dismissed with prejudice State law tort claims against the County, the Prince William Police Department and Sheriff's Department and Count VII, Respondeat Superior. The Court dismissed Count V (Battery: Defendant Schaul) and Count VU (Assault: Defendant Schaul) with prejudice. The pending counts include violation of constitutional rights and wrongful death by Officers Ford, Harman, Schaul and Deane, assault and battery by Ford and Harman and punitive damages against all Defendants.

Plaintiffs seek $15 million in compensatory damages and $10 million in punitive damages, jointly and severally against the all [*sic*] Defendants.

Around midnight on December 12, 1997, Adam Conrath, ("Conrath") the nextdoor neighbor of Brian and Joan Cox, called the Prince William County Police to report that his wife heard the sound of breaking glass at the Cox residence. Conrath also reported that a light inside [*sic*] Cox residence had then been turned off and that he saw that the window in the rear of the house had been pushed up. He also reported that there was no car in the Cox driveway as there usually was that time of night. The Prince William County Police dispatcher ("Communications") sent out a "tone alert" over the radio for a suspected burglary in progress at the townhouse to the left of [*sic*] Conrath residence. Officers Mark J. Harman ("Harman") and Nathan J. Jones ("Jones") responded to the call and arrived at approximately 12:05 a.m., December 12, 1997. Harman went to the front of the townhouse row while Jones went to the back. From his position in the rear, Jones observed that the venetian blind to one of the second level windows at the rear of the Cox residence was disturbed or broken with a screen missing. He also spoke or motioned to someone standing at the window of the Conrath residence, inquiring whether anyone had exited the window and got a negative response. Officers Sandra M. Conlon ("Conlon") and Stephen C. Mercer ("Mercer") arrived on the scene shortly after Officers Harman and Jones. Officer Conlon went to the rear of the Cox residence where Officer Jones was stationed, while Officer Mercer went to the front where Officer Harmon [*sic*] was stationed.

While waiting for the canine unit to arrive, Officer Harmon [*sic*] left Officer Mercer at the front station and went to his squad car. Harman contacted Communications, attempting to obtain a telephone number for the Cox residence, which he knew at that time only by his address, 17357 Montezuma

Way. Officer Harman also asked Communications for the phone number for the Conrath residence. Officer Harman used his personal cell phone to call the Conraths to obtain more information about the residence at 17357 Montezuma Way, such as the names of the persons who lived there and whether a car was normally in the driveway. Mr. Conrath provided this information. About the time Officer Harman finished his telephone conversation with Mr. Conrath, Communications relayed that it had been unsuccessful in obtaining a telephone number for the 17357 unit using the "Haines Directory," a directory that allows one to find a phone number with an address and vice-versa. Harman had now obtained the name of the resident of the 17357 unit from Mr. Conrath, he asked Communications to search for a telephone number using the 411 information system under the name of Cox or Brian Cox, telling the dispatchers that it was probably going to be a new listing since the townhouses were new. Communications reported back that it also could not find a number using 411 information.

Officer Ford arrived with a police canine at approximately 12:30 a.m. Officer Ford devised a plan whereby Officers Harman and Jones would climb through the broken or open window in the rear of the residence and unlock the front door so that Ford could enter with the canine. Officers Harman and Jones then executed this plan, confirming that the window had been broken from the outside along the way, and proceeded directly and quickly to exit through the front door leaving it open behind them. On existing [*sic*], Officer Jones and Officer Ford noticed what they took to be broken automobile glass on the driveway of the Cox residence. Prior to entering the residence, Ford stood at the wide-open front door with his canine and shouted three identical loud announcements into the residence with pauses between them: "Police canine, Speak to me now or I'll turn the dog loose!" After one of these announcements, Officer Ford heard what he took to be movement inside, but Officer Harman thought

the movement came from the Conrath residence, immediately to the right of the Cox residence. The warnings were heard by Officer Conlon, stationed at the opposite side of the townhouse row. They were heard by the Conraths from inside their closed, adjoining townhouse. They were also heard by a neighbor, some 100 years away, who came out on his front porch when the announcements were being made. Decedent Brian J. Cox did not respond to these announcements. Officer Ford then entered the Cox residence with his canine on lead accompanied by Officers Harman and Jones.

Officer Jones stationed himself at the top of the staircase to the basement. Upon completion of the search of the main level, Officer Harman followed Officer Ford and his canine upstairs. Near the top of the stairs Officers Ford and Harman saw a white male, who later turned out to be Decedent Cox, lying in a bed in a bedroom across the hallway from the stairs. The man did not respond to additional Police announcements made at the top of the stairs outside his bedroom. The Officers then entered the bedroom with Officer Ford maintaining the canine on lead.

Inside the bedroom Officer Ford and his canine took up a position at the foot of the bed and Officer Harman took up a position on the right side of the bed (as one faces it from the foot) near the foot. The Officers saw that the man was lying on his left side with his left arm underneath him and his right arm laying out in front of him with both his hands covered with bedcovers. He was lying across the length of the bed, about three-quarters down from the head of the bed, on a slight diagonal, with his eyes closed and facing towards the door the Officers had just come through. The man was wearing a white t-shirt and boxer shorts and remained motionless. There was sufficient ambient light to see the man.

Officer Ford then yelled "hey" in another unsuccessful attempt to get the motionless man to respond. Shortly thereafter, Officer Harman slowly and methodically reached out to

touch or tap the bottom of the man's foot in a continued attempt to rouse the man. At this moment, Officer Harman's attention was diverted from the colored tatoo on the man's right leg by the sound of Officer Ford yelling something like "show me your hands" or "get your hands up." The man was bringing a rifle up to [*sic*] from underneath the covers, pointing it in the direction of Officer Ford and yelling something like "AHHHHHH." Officer Ford unholstered his service weapon and starting shooting at the man. Harman already had his weapon drawn and starting shooting because he thought that the man was going to kill Ford. One or more of the shots whet [*sic*] through the man's right wrist splitting the wooden stock of the rifle as the man held the rifle in a firing position. Jones came up the stairs immediately upon hearing the shots and moved the rifle away from the man's reach. The Officers immediately for an ambulance but the rescue crew determined that he was dead upon their arrival.

Prior to and at the time the police responded, the Defendant officers were unaware that Cox had previously broken into his home after his wife drove off with the housekeys because he had beaten her so severely that a friend had taken her to the emergency room.

The Criminal Investigative Division of the Police Department ("CID") conducted a criminal investigation. Following this investigation, the Commonwealth's Attorney determined not to prosecute Officers Ford and Harman. The Internal Affairs Division ("I.A.") of the Police Department also conducted an investigation, and the Department's Deadly Force Review Board reviewed the incident in order to determine whether discipline or other action should be taken. As a result of these investigations, it was determined that no discipline against Ford and Harman was warranted and that they had complied with te [*sic*] Department General Orders with respect to use of force. The United States Department of

Justice also conducted an investigation of the incident and determined that no action should be taken.

Summary Judgment is appropriate where there is no genuine issue as to any material fact. *See* Fed. R. Civ. R. 56 (c). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. *See Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the nonmoving party. *See id.* Mere speculation by the non-moving party "cannot create a genuine issue of material fact." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *See also Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When a motion for summary judgment is made, the evidence presented must always be taken in the light most favorable to the non-moving party. *See Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996) (*en banc*).

In Count I, Plaintiffs allege that Officers Ford and Harman violated Cox's constitutional rights as protected by the Fourth, Fifth, Eighth and Fourteenth Amendments under 42 U.S.C. § 1983. The Supreme Court, however, has held that "all claims that law enforcement officers have used excessive force, deadly or not, in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its

'reasonableness' standard." *Vathekan v. Prince George's County*, 154 F.3d 173, 178 (4th Cir. 1998) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). All of Plaintiffs' claims are related to the use of deadly force or attendant thereto. Based upon the undisputed facts of this case, the law precludes Plaintiffs' Fifth, Eighth and Fourteenth Amendment claims against Officers Ford and Harman.

The Fourth Circuit has recognized the doctrine of qualified immunity in cases involving excessive force claims. *See Elliott v. Leavitt,* 99 F.3d 640, 642 (4th Cir. 1996). Under this doctrine, "government officials who perform discretionary functions are not liable under § 1983 for civil damages to the extent that their conduct does not contravene 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *McLennan v. Karnes*, 27 F.3d 1002, 1006 (4th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity is "an immunity from suit and not merely a defense to liability," and it bars such liability "'if a reasonable officer possessing the same information could have believed that his conduct was lawful,' even if the conduct was in fact unlawful." *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 786 (4th Cir. 1998); *Austin v. Town of Blacksburg*, 66 F.Supp.2d 771 (W.D.Va. 1998) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In determining whether a police officer is liable under § 1983, a court must (1) identify the specific right allegedly violated; (2) determine whether the right was clearly established at te [*sic*] time of the incident; and (3) decide whether a reasonable person in the officer's position would have known that his or her actions violated that right. *See Simmons v. Justice*, 87 F.Supp. 2d 524, 531 (W.D.N.C. 2000)(citing *Gould v. Davis*, 165 F.3d 265, 272 (4th Cir. 1998)). Subjective factors, including the officer's state of mind are not relevant, but the officer's perceptions of the

objective factors of the incident in question are. *See Milstead v. Kibler*, 91 F,Supp.2d 895 (W.D. Va. 2000) (citing *Rowland v. Perry*, 41 F.3d 167, 172-73 (4th Cir. 1994). In this case, the specific right allegedly violated is the right to be protected against the use of excessive force. In *Elliott*, the Fourth Circuit described how the Fourth Amendment "reasonableness" inquiry must reflect the considerations underlying the analysis of a qualified immunity defense.

The standard of review is an objective one. The intent or motivation of the officer is irrelevant; the question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others.

The court's focus should be on the circumstances at the moment force was used and on the fact that the officers on the beat are not often afforded the luxury of armchair reflection.

In focusing on the circumstances at the moment force was used by the Officers to shoot Cox, the evidence is uncontroverted that Cox pulled out a concealed rifle from under the covers and raised it in the direction of Officer Ford, not responding to commands that he surrender it. This all occurred within the small distances in a bedroom with Cox on the bed and Officers Ford and Harman next to it. There is no dispute about the fact that Cox unexpectedly raised a rifle from under the covers and pointed it at Officer Ford.

It is not material that Cox might not have been successful in hitting Officers Ford or Harman or that Cox might not have actually had Officer Ford in his sights at the time that the Officers fired.

The critical point is that Cox was "threatening," threatening the lives of [Officers] Leavitt and Cheney [*sic*]. The Fourth Amendment does not require Police officers to wait until a suspect shoots to confirm that a serious threat of harm exists.

No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life. Officers need not be absolutely sure of the nature of the threat or the suspect's intent to cause them harm. The Constitution does not require that certitude precede the act of self-protection.

The undisputed material facts clearly demonstrate that Ford and Harman had a sound and objective reason to believe that Cox posed a serious threat to their safety. Plaintiffs argue that Cox never posed a real threat to the officers because he was groggy, confused and intoxicated. Cox's undisputed action, riding [*sic*] up from the bed with a rifle pointed at one of the officers, posed a threat to which they could respond with deadly force.

Plaintiffs contend that (1) material facts are in dispute, (2) the Officers created a situation leading to Cox's death, and (3) that the Officers should have used alternate methods to engage him. However, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not counted [*sic*]." *Drewitt v. Pratt*, 999 F.2d 774, 778 (4th Cir. 1993). In this case, it is not only undisputed that a rifle was recovered from Cox after he was shot, but it also undisputed that Cox holding it [*sic*] and pointing it toward Officer Ford right before the Officers.

Plaintiffs claim that Officers Ford and Harman violated standard police procedure prior to the shooting and that such alleged violations created a dangerous situation leading to Cox's death. Discovery has not revealed any evidence of unconstitutional activity by the Officers prior to Cox pointing a previously concealed rifle at Ford.

The Fourth Circuit has rejected the argument that officers can be held liable for allegedly "recklessly creating a dangerous situation." The Court has held that such alleged violations of police procedure prior to the use of deadly force are not material for summary judgment purposes. In determining whether Ford's and Harman's decisions to shoot Cox were reasonable for purposes of qualified immunity, one must focus on their conduct at the specific moment they decided to use force. The critical undisputed material fact is that Cox rose up from the bed with a rifle and the Officers reasonably perceived a serious threat to their safety.

Plaintiffs also suggest that the Officers should have used alternate methods to "wake" Cox or to engage him once he began to pull out his concealed weapon from under the covers, but this is exactly the type of armchair analysis that the court in *Elliott* forbids. A reviewing court may not employ vision of hindsight and must make allowance for the fact that police officers are often forced to make split-second judgments. When Officers Ford and Harman discovered an unresponsive individual in an upstairs bedroom while investigating a burglary in progress call, they were clearly engaged in a "tense, uncertain, and rapidly evolving" situation. Once Cox unexpectedly raised a concealed rifle, any reasonable officer in the same circumstances would have perceived Cox's actions as posing a serious threat of physical harm. At that point, their use of deadly force is not excessive. *McLenagan,* 27 F.3d at 1006 (citing *Tennessee v. Garner,* 471 U.S. 1, 11 (1985). More importantly, the Officers are protected by qualified immunity as long as any reasonable officer, possessing the same particularized information, could have believed that his conduct in that circumstance was lawful.

In fact, courts have repeatedly protected police officers with qualified immunity even when it was apparent in 20/20 hindsight that the officers made mistakes. In so doing, the

courts have viewed the use of force through the eyes of a reasonable officer under the circumstances a [*sic*] the time, not with the benefit of 20/20 hindsight. *See Elliott*, 99 F.3d at 642. For example, in *McLenagan*, the court determined that a police officer who shot the wrong person when a fellow police officer screamed "The man has got a gun!" was protected by qualified immunity and thus granted the defendants' summary judgment motion. 27 F.2d at 1005-06. The officer was protected by qualified immunity even though he gave no warning, did not actually see a gun in the plaintiff's hands, and shot the wrong person. *See id.* In *Milstead v. Kibler*, the court granted summary judgment on qualified immunity grounds to the defendant police officer who accidentally shot a homeowner instead of a burglar. 91 F.Supp. 2d 895 (W.D. Va. 2000). Again, the officer did not warn before shooting and did not know whether the person he shot had a gun. *See id.* In *Slattery v. Rizzo*, the Fourth Circuit held that an officer reasonably felt threatened in a situation where he could not see the suspected weapon at all, and in *Ruffin v. Greenidge,* the Fourth Circuit affirmed judgment for a police officer who used deadly force to protect herself before confirming the nature of the weapon she believed was about to be used against her. *Slattery*, 939 F.2d 213 (4th Cir. 1991); *Ruffin*, 927 F.2d 789 (4th Cir. 1991). In both of these cases, the officers were protected by qualified immunity despite the fact that they misjudged the arrestee's capability to shoot them.

All of the officers in the above examples made serious mistakes but were protected by qualified immunity because the courts have wisely declined to view the reasonableness of an officer's split-second decision from the luxury of armchair reflection. *Elliott*, 99 F.3d at 642. Officers Ford and Harman, however, did not make these mistakes. They responded just like Officers Leavitt and Cheney, who suddenly had a gun pulled on them in *Elliott*. Any reasonable officers, given the same exact circumstances and without the benefit of

hindsight, would have defended themselves in the same manner. Summary judgment must be granted for the defendants on the Fourth Amendment claim under § 1983 because they are protected by qualified immunity.

Count II alleges that Lt. Schaul, as the highest-ranking officer at the scene of the Cox residence burglary investigation, acted with deliberate indifference and failed to properly supervise Officers Harman and Ford. In Count III, Plaintiffs claim that Chief Deane and the County are liable because they failed to adequately train and supervise these officers. Plaintiffs, accordingly, claim that their actions violated 42 U.S.C. § 1983 and the laws of the United States and Virginia, and Schaul's actions violated 42 U.S.C. § 1983 and Cox's Fourth, Fifth, Eighth and Fourteenth Amendment rights.

Plaintiffs' derivative claims against Schaul, Deane and the County must be dismissed when there is no underlying constitutional violation. *See McLenagan*, 27 F.3d at 1008; *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990). The Fourth Circuit has stated: "In the absence of any underlying use of excessive force against [Officer Wilson], liability cannot be placed on either the non-shooting officers, a supervisor, or the City. *Hinkle v. City of Clarksburg*, 81 F.3d 416, 420 (4th Cir. 1996).

In addition, Plaintiff has not established a prima facie case against either Lt. Schaul or Chief Deane. Regarding the claims of failure to supervise, § 1983 does not impose respondeat superior liability. *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Liability attaches only where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights. *See Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977). The Fourth Circuit uses a three-part test to determine whether supervisory liability should be imposed under § 1983:

> 1) The supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of unconstitutional injury, 2) the supervisor's response to that situation was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices, and 3) there was an affirmative causal link between the supervisor's inaction and the constitutional injury suffered by the plaintiff.

With regard to Defendants Schaul and Deane, Plaintiffs simply cannot establish these prima facie elements. Officers Ford and Harman never engaged in behavior that posed a pervasive and unreasonable risk of constitutional injury, making it impossible for Schaul or Deane to have actual knowledge of such behavior. There is no evidence that Schaul or Deane knew or should have known, prior to the time Ford and Harman entered Cox [*sic*] residence, that Ford or Harman were likely to unconstitutionally shoot someone therein. Plaintiffs lack any evidence indicating that Lt. Schaul was in a position to intervene to prevent the shooting or alleged battery.

As for the claim of failure to provide adequate training against Chief Deane and the County, training is not an issue when the conduct of the Officers is objectively reasonable by law. The Supreme Court has noted that inadequate training claims are cognizable only in 'limited circumstances' where the officials adhere to a training program despite knowledge that the program is ineffective and causes a constitutional violation. *Canton v. Harris*, 489 U.S. 378, 387 (1987). Discovery has produced no evidence that Prince William County Officers received inadequate training about responding to suspected burglaries, let alone that the officials were aware that they were providing inadequate training. Therefore, there is no evidentiary basis upon which Plaintiffs can claim that Deane knew that his department's training

program was ineffective and that it would cause a constitutional injury.

In Count VIII, Plaintiffs allege that Officers Ford and Harman are liable under the Virginia wrongful death statute § 8.01-50 VA Code Ann. On [*sic*] the basis of gross negligence and conscious indifference.

Gross negligence is the "absence of slight diligence, or the want of even scant care. It is that degree of negligence that 'shows an utter disregard of prudence amounting to a complete neglect of the safety of another.'" *McLenagan*, 27 F.3d at 1009 (citing *Frazier v. City of Norfolk*, 362 S.E.2d 688, 691 (1987)). None of the undisputed material actions taken by Officers Ford or Harman in investigating the possible burglary at the Cox residence even approach the exceedingly high standard of gross negligence.

In the count for gross negligence, Plaintiffs allege that Officers Ford and Harman acted "in an utter disregard of prudence for the safety" of Brian Cox in their entrance and search of the Cox residence. Plaintiffs claim that they violated a duty of reasonable care to: (1) perform police duties without excessive force (2) enter into and search a residence for a potential suspect in a reasonable fashion and (3) to wake up or alert someone who is sleeping without creating a dangerous situation. Plaintiffs further claim that the Officers could have used alternatives to deadly force.

The duty of reasonable care is the standard for simple negligence, for which the Officers have sovereign immunity under State law. *See Messina v. Burden*, 321 S.E.2d 657 (1984). The standard for gross negligence is clearly a much higher standard than "reasonable care," thus making Plaintiffs' list of "duties of reasonable care" legally irrelevant.

The Officers' reasonable investigation of the possible burglary at the Cox residence does not even approach the realm of gross negligence. Plaintiffs do not contest that the Officers had probable cause to enter the residence; they admit

the Officers had probable cause in responding to a burglary in progress call. Nor do Plaintiffs contest that the Officers attempted to secure more information about the occupants or that they made repeated announcements so as to avoid unnecessary confrontation. Indeed, they admit that Cox did not respond to police announcements made at the top of the stairs outside his bedroom.

Plaintiffs cannot seriously suggest that the Officers committed gross negligence by allegedly tapping Cox's foot in a continued effort to rouse him. Tapping or shaking an individual, who is not responding to verbal announcements, is a perfectly reasonable, commonsense method of rousing someone whose identity and business in the residence must be investigated. There is no basis for a contention that this conduct falls below any standard of care, much less that for gross negligence. Furthermore, the Police Department determined Ford and Harman acted consistently with General Orders.

Once Cox unexpectedly rose from the bed holding his loaded rifle, the Officers were confronted with a threat of serious physical harm and were entitled to use deadly force. *See Elliott*, 99 F.3d at 642 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). Officers Ford and Harman had to make an incredibly difficult, split-second decision. In this type of situation, a claim for gross negligence will not lie as a matter of law where an officer is "faced with an impossible choice that had to be made in the flickering of an instant." *McLenagan*, 27 F.3d at 1009.

At the moment the Officers entered the bedroom, they did not know whether the unresponsive individual in the bed was an intruder or a resident. They did not know if he was unconscious, injured, dead, asleep or feigning sleep. Indeed, the Officers were trying to secure this information just prior to when Cox pointed his rifle at Officer Ford. Plaintiffs have admitted that Cox did not respond to police announcements

made at the open front door and the top of the stairs outside Cox's bedroom. All of these announcements were designed to prevent confrontation. Subsequently tapping such a person on the foot in an attempt to rouse him was a reasonable and common sense next step and certainly not one that rises to the level of a grossly negligent method of attempting to wake someone up.

Alternatively, Plaintiffs will contend [*sic*] that the Officers should have used non-deadly force to respond to a threat of deadly force by jumping on Cox or releasing the police canine on him once he pointed his rifle at Officer Ford. This argument is not supported by case law. In *Plakas v. Drinski*, the Court indicated there is no precedent in this Circuit (or any other) which states that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can be justifiably used. There are, however, cases which support the assertion that where deadly force is otherwise justified under Constitution, there is no constitutional duty to use non-deadly alternatives first. Officer Ford testified that canine might have just sat there or would have possibly even gone after Officer Harman. Further, the law is quite clear that, once the Officers had sound reason to believe that the suspect posed a serious threat of physical harm, they were entitled to use deadly force. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

Virginia law provides protection to officers from civil liability under similar circumstances. Section 18.2-282 (B) of the VA Code Ann. provides in pertinent part that:

> Any police officer in the performance of his duty, in making an arrest under the provisions of this section, shall not be civilly liable in damages from injuries or death resulting to the person being arrested if he had reason to believe that the person being arrested was pointing, holding or brandishing such firearm, or object

which was similar in appearance to a firearm, with intent to induce fear in the mind of another.

Defendants' acts, as a matter of law, do not approach the realm of gross negligence; there is simply no "palpable violation of rights showing an utter disregard of prudence" here. *Meagher v. Johnson*, 389 S.E.2d 310, 311 (1990). The material facts not in dispute indicate that Ford and Harman acted a manner [*sic*] that was objectively reasonable and in self-defense.

In Counts IX and X, Plaintiffs claim Schaul and Deane are liable for wrongful death. As stated earlier, derivative claims against supervisors fail when an underlying violation cannot be established. *See McLenagan*, 27 F.3d at 1009; *Hinkle v. City of Clarksburg*, 81 F.3d 416, 420 (4th Cir. 1996). In addressing the state claims in *McLenagan*, the Court stated: "It logically follows that if [the Officers'] actions at the scene did not constitute gross negligence, then Sheriff Winston was likewise not grossly negligent in training [the Officers'] to react in such a fashion." 27 F.3d at 1009.

In Counts IV and VI, Plaintiffs allege that Officers Ford and Harman committed assault and battery. To establish a prima facie case for assault and battery, Plaintiffs are "required to prove both a 'wrongful act' and resultant physical injury. A wrongful act imports lack of justification or excuse." *Id.* (citing *Pike v. Eubank*, 90 S.E. 2d 821, 827 (Va. 1956)). Where the officer's actions are justified as a matter of law, claims of assault and battery must be dismissed. *Id.*

Plaintiffs' battery claim alleges that Officers Ford and Harman made offensive and unprivileged physical contact with Brian Cox which caused serious physical injury. Plaintiffs allege two separate instances of physical contact: (1) Officer Harman's alleged touching of Cox's foot and (2) the shooting by Officers Ford and Harman which caused Cox's death.

Based on the circumstances, both Harman's decision to wake up Cox and the means he used to accomplish it, tapping Cox on the ankle, do not collectively or individually objectively constitute a wrongful act. Harman did not, for example, recklessly swing a weapon at Cox's ankle to wake him up. It is not disputed that instead he leaned forward, slowly and methodically reached out. It was not a forceful, quick movement, [*sic*] it was slow and methodical. This movement was only made after verbal rousing failed. As stated in *McLenagan,* a wrongful act imports "a lack of justification or excuse." 27 F.3d at 1009. Attempting to rouse an unresponsive individual in the midst of an investigation of a possible burglary was not only justified, it was an appropriate form of action given the circumstances. The Officers did not know whether Cox was a burglar feigning sleep or a homeowner in need of assistance. It was appropriate for them to determine his identity and condition.

The other aspect of Plaintiffs' assault and battery claim against Officers Ford and Harman concerns the shooting itself. Again, this claim requires a wrongful act—an act committed without justification or excuse—that results in physical injury. As discussed above, once Cox pulled out the rifle, the Officers had a sound reason to believe that Cox posed a serious threat to their safety. *See Tennessee v. Garner,* 471 U.S. 1 (1985). Accordingly, they were entitled to respond with deadly force and the shooting was justified. *See id.*

Finally, in Count VI, Plaintiffs allege that Officers Ford and Hannan assaulted Brian Cox. The Third Amended Complaint states: "They [Ford and Harman] intended to create in him [Cox] an apprehension of an immediate battery . . . they made an overt threatening physical gesture which conveyed to the decedent that a battery was imminent." If, by "threatening physical gesture" Plaintiffs are referring to Officer Harman's attempt to touch Cox to wake him, it is

important to note that it is undisputed that Cox had his eyes closed. Therefore, there is no material fact that Cox ever apprehended the touch. For an assault to occur, the action must create an apprehension of physical contact. *See Bowerman v. Industrial Towel Supply,* 1995 U.S. Dist. Lexis 20747 (W. D. Va. 1995). There is no factual basis upon which such a claim could be made.

For the foregoing reasons, summary judgment should be granted in Defendants Prince William County, Chief Charlie T. Deane, Officer James Ford and Officer Mark Harman on all counts and against Plaintiffs.

An appropriate Order shall issue.

Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia August 3, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-1880-A

JOAN H. COX, *et al.*,

Plaintiff,

v.

PRINCE WILLIAM COUNTY, *et al.*,

Defendants.

ORDER

This matter comes before the Court on Defendants Schaul, Harman, Ford, Deane and Prince William County's Motion for Summary Judgment. For reasons stated in accompanying Memorandum Opinion, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is GRANTED and this case is DISMISSED.

Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia August 3, 2000

Supreme Court, U.S.
FILED
OCT 3 2001
OFFICE OF THE CLERK

No. 01-389

IN THE

Supreme Court of the United States

JOAN H. COX, Individually, and as Widow and Personal Representative of the Estate of Brian J. Cox, deceased; and as Mother and Legal Guardian of Brian Justin-Tyler Cox, a minor,

Petitioners,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant a writ of *certiorari* when the Fourth Circuit affirmed, *de novo*, a district court's grant of summary judgment after determining that the use of deadly force was justified, no constitutional violation had occurred prior to the use of deadly force, there was no evidence of a genuine dispute as to a material issue of fact, and where the Fourth Circuit's decision is consistent with this Court's precedent and not in clear conflict with another court of appeals.

PARTIES TO THE PROCEEDING

Respondents differ with Petitioners' List of Interested Parties in one respect. The Prince William County Police Department should not be included as a party. Prince William County Police Department was dismissed as a party following an early motion to dismiss. Petitioners did not include the Police Department as a defendant when they filed their Third Amended Complaint that was the subject of the motion for summary judgment.

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Cited Authorities

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STATEMENT OF JURISDICTION

Respondents do not dispute the Petitioners' Statement of Jurisdiction. For the reasons set forth herein, Respondents believe that this Court should not exercise its discretion in this case and grant a writ of *certiorari*.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Fourth Amendment to the United States Constitution and 28 U.S.C. § 1983. In the district court, Petitioners raised issues of State law but abandoned those in their Petition.

STATEMENT OF THE CASE

Introduction

This is a claim of excessive use of force brought under the Fourth Amendment of the Constitution and 42 U.S.C. § 1983[1]. The issue was whether Respondents County and Police Officers violated the constitutional prohibition against use of excessive force in shooting a man who, during their investigation of a suspected burglary in progress, made no response to repeated announcements and attempts to rouse him, then suddenly pointed a previously-concealed rifle at an officer who was next to the bed.

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1. Petitioners made claims under State law which were dismissed by the district court and not pursued in the court of appeals or here.

Proceedings Below

As required, the Fourth Circuit reviewed the district court's grant of summary judgment *de novo*. It found that there was no genuine issue as to any material fact and that the Respondent Officers' conduct did not, as a matter of law, violate the Fourth Amendment. Specifically, the court of appeals found that the use of deadly force by Officers Ford and Harman was a reasonable response to an immediate and serious threat to their safety. Pet. App. 11a. It held that there was no evidence beyond mere speculation that the Officers used excessive force prior to the use of deadly force and that an officer striking a person's foot was not an unconstitutional use of force under the undisputed circumstances extant. *Id.* at 10a. Because the Court found no underlying constitutional violation, it determined that it was unnecessary to reach the issue of qualified immunity. *Id.* at 11a. The court affirmed the dismissal of the claims against the other Respondents in the absence of any underlying use of excessive force.[2]

The district court had previously dismissed the Fourth Amendment violation claims under § 1983 on the grounds that the Officers were entitled to the protection of qualified immunity and also because it found no constitutional violation. It dismissed Petitioners' derivative claims against Respondents Lt. Schaul, Chief Deane and the County. Pet. App. 23a. It also found Plaintiffs did not establish a *prima facie* case against these Defendants for failure to supervise or train. Pet. App. 24a-25a. Finally, for various good reasons, the district court dismissed all of the State law claims. Pet. App. 25a-30a.

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2. No credence should be given to Petitioners' insinuations about the District Court. Pet. 10-11. Clearly, Petitioners do not agree with that court's holding because it concurred with Respondents' motion for summary judgment.

The Fourth Circuit properly found that the Officers' actions under the instant circumstances did not constitute a clear constitutional violation and that the inferences by Petitioners are not material facts in dispute and, therefore, summary judgment was proper. Respondents believe that this Court should deny the Petition.

Factual Background

a. Factual Agreement

Petitioners' Petition contains assertions that are unsupported by any evidence. For example, Petitioners' Question Presented sets forth a bizarre proximate cause type analysis, based on speculation, that fails to take into account Petitioners' admission that the Police were justified in shooting their decedent when he pointed a rifle at them as they investigated a burglary in progress and Petitioners' admission that their decedent failed to respond to repeated Police announcements. Pet. 5, 6; Also Petitioners' expert at JA 654-55.

Respondents incorporate in their Statement of the Case the facts set forth in the Fourth Circuit's opinion below and, where there is conflict, urge their adoption over that of Petitioners. Respondents do not concur with every fact assumed by the Fourth Circuit, however. That court was required to look at the facts in the light most favorable to the Petitioners. Pet. App. 8a. Most relevant to Petitioners' argument before this Court, the Fourth Circuit assumed that decedent Cox had a bruise on his foot. The court found that no evidence, beyond mere speculation, to suggest that Harman caused the bruise through the application of unconstitutional excessive force. Pet. App. 10a.

Petitioners make much of the need for courts on summary judgment to consider the fact intensive nature of an excessive use of force analysis. Therefore, Petitioners' substantial agreement with most of the facts in this case must be highlighted. Pet. 7. Importantly, Petitioners concur with Respondents as to the material facts *occurring before and after* Petitioners allege that Officer Harman struck Cox on the foot causing a bruise. Pet. 4-7.

Petitioners concur that Police Officers Ford and Harman, as well as Officer Jones, entered the Cox townhouse to investigate a burglary in progress as the result of a neighbor's call. Pet. 4. Petitioners agree that the Police gave three announcements and warnings before entering with canine to search.[3] They do not dispute that, when the Police searched upstairs, the Officers did not know the identity of the unresponsive man (Cox) they saw laying partially covered on a bed upstairs. *See* Pet. 5-6. Petitioners acknowledge that the Officers gave numerous warnings and announcements in attempts to rouse Cox and that Officer Ford's canine was barking within two feet of Cox's head. Pet. 5. Petitioners concur that, only after the Police shouting and canine barking failed, did Officer Harman make a movement toward Cox's foot. *Id.*

Moving forward in time to Cox's actions *after* Harman allegedly struck Cox's foot hard enough to cause a bruise, Petitioners concur with Respondents that Cox then came off the bed to a seated position pulling a rifle from underneath the covers. Pet. 6. They do not deny that Cox had had the loaded rifle concealed. *Id.* They concur that Cox failed to drop the rifle when

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3. There is no suggestion that the Police were not proceeding in a deliberate manner. The warnings were overheard by neighbors. JA 191, 221.

told to by Officer Ford and that he continued to point the rifle at Officer Ford who was standing next to him by the bed. *Id.* Petitioners do not dispute that Officers Ford and Harman were justified in shooting Cox at this point in self-defense.

b. Factual Disagreement about a Bruise which Fourth Circuit Resolved in Favor of Petitioners

Petitioners argue with the facts encompassing an instant in time. They claim from a picture taken by their private investigators that, contrary to an independent medical examiner's report, a bruise existed on Cox's foot at the time of the autopsy. Petitioners' claim of excessive force rises and falls on an alleged bruise to their decedent's left foot. *See* Pet. 18. They build inference upon this speculation and conclude that the yell[4] which the Officers heard from Cox was a response to pain or being startled as he awakened from sleep, and, therefore, Harman "whacked" Cox on the foot during the instant in time before Cox came off the bed with a rifle pointed toward Officer Ford. Pet. 19, 9a; JA 237-238.

Petitioners' sole basis for seeking a writ is speculation that a bruise indicated that Harman recklessly or aggressively struck Cox on the foot with a police flashlight. While Petitioners presented no credible evidence of a bruise and the court was not required to credit inference and speculation, the Fourth Circuit gave Petitioners the benefit of the doubt and *assumed a bruise on Cox's foot*. Pet. App. 10a. This was more than Petitioners were due, even under a summary judgment standard.

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4. Officer Harman declared that the man yelled "AHHHH" (JA 223), an utterance which rather indicated offensive action in the tradition of the movie character "Rambo," which is more consistent with the sudden manner Cox rose up with a previously concealed rifle.

Because Petitioners make much of this bruise issue in their Petition, Respondents digress to show what little evidence Petitioners presented in this regard. The "bruise" did not appear in the autopsy performed by an independent State Medical Examiner. JA 240-52. Petitioners' assertion is based solely on a photograph taken by their private investigators. The photographers had no medical training to know whether what they were looking at was a bruise or some other medical condition or phenomenon typically associated with dead bodies. JA 474-78. Petitioners' medical expert, Dr. Jack Daniels, was not present at the autopsy and offered his opinion based only on the same photograph. JA 649-650.

Contrary to Petitioners' assertions, Dr. Daniels did not opine that what he saw in the photograph was necessarily a bruise. At his deposition he agreed that the picture was also consistent with other things, such as a birthmark, or varicosity. JA 649-50. The alleged bruise was not large as alleged at Pet. 7. Dr. Daniels indicated that any such bruise would have been made by mild or moderate force, *at most* (not severe force). JA 652-53 (emphasis added). He admitted that any blunt impact could have been delivered by Cox's other undisputed activities on the night in question. JA 651.

Officers Harman's and Ford's statements do not conflict about whether Harman touched Cox, so as to create "sufficient evidence for a jury to find that Harman struck Cox with substantial force and that that sharp blow was the catalyst for the events that led to Mr. Cox's death." Harman swears that he "reached over to tap or touch the bottom of the man's right foot in order to get a response." JA 223. Officer Ford says Harman's movement "was not a forceful, quick movement, but one that was very slow and methodical." JA 214, 269. Petitioners admit that Harman reached out toward Cox's foot because the Officers

had been yelling at Cox who was unresponsive. Pet. 6; JA 430.[5] They resort to suggesting that Harman fabricated his affidavit because, until then, he did not indicate which of Cox's feet he intended to or did touch. Pet. 8.[6] Yet no one, including Petitioners' counsel, in deposing Harman, previously asked him which foot he touched or intended to touch. Officer Harman's statements that he was focused on a colored tattoo (which the autopsy shows was only on Cox's right leg) are consistent with the undisputed physical evidence that Cox was laying on his left side with his feet on the bed and Harman's previous statements. JA 223, 431, 238, 249.[7] Petitioners' similar lame attempt to set up inconsistencies with Officer Ford's statements are defeated by the Officers' admission that Harman intended to touch Cox's foot to try to rouse Cox. It is a total leap from this for Petitioners to conclude without evidence that Officer Harman struck Cox with excessive force, much less that he did so recklessly or aggressively.

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5. There is no evidence that Officer Harman struck Cox's foot aggressively or out of frustration as alleged by Petitioners. Pet. 6.

6. Petitioners' statements about Officer Harman being untruthful in the past are a red herring, not a basis for sending this matter to trial on whether or not he used excessive force in touching or attempting to touch Cox. An incident of some 9 years earlier for which Officer Harman received harsh discipline would not be admissible evidence under Fed. R. Evid. 404(b) and has no probative value. *See also United States v. Davis*, 657 F.2d 637, 639 (4th Cir. 1981). The allegations about Harman's statements on two other incidents are unfounded and again not probative of the issue of whether he struck Cox. JA 433-435.

7. A strike to the left side of the foot would have been an extremely awkward and improbable movement under the circumstances.

Petitioners repeatedly claim that Cox was asleep before Harman touched him, presumably to draw an inference that, Cox was harmless and rose reflexively. Pet. 5. Again, however, Petitioners presented no evidence, just inference. *See id.* The Fourth Circuit also assumed this as a fact favorable to Petitioners. It, however, concluded that even a man who had been sleeping is not justified in pointing a previously concealed rifle at the Officers; and that the Officers may use deadly force to protect themselves. Pet. App. 11a.

Finally, Petitioners herald Cox as the homeowner. Whether the Officers could have known that Cox was the homeowner at the time of the incident is irrelevant. It was material that in the course of investigating a suspected burglary, the Officers could not rouse Cox and, when Officer Harman tried to, Cox pointed a rifle at Ford and would not drop it.[8] Petitioners do not deny that the person who presented a life threat to Officer Ford was the homeowner Cox. Petitioners are never so outrageous as to argue to this Court that the pointing of a loaded rifle by Cox at Officer Ford is a proper response to a strike on the foot. Petitioners concede that the Officers were justified in shooting Cox once he rose up out of the bed with a rifle pointing at Officer Ford's chest.

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8. Similarly, the allegations regarding Lt. Schaul are specious. There was no evidence that Schaul knew that Officer Harman or Ford was likely to unconstitutionally shoot someone in the Cox residence. The Deadly Force Review Board concluded that Officers Ford and Harman's use of force was within policy. JA 189.

REASONS FOR DENYING THE WRIT

The question presented by Petitioners is whether the Fourth Circuit and lower court improperly "stripped" the jury, as factfinder, from determining whether Respondent Police Officers acted in an objectively reasonable manner in using non-deadly force to strike Cox on the foot, which they claim caused Cox to point a rifle at the Officers. Pet. 4. The force which Petitioners question is not the Officers' use of deadly force in self-defense, when decedent Cox pointed a rifle, but rather Officer Harman's effort to rouse Cox by touching, tapping or striking his foot hard enough to cause a bruise. Importantly, the material circumstances surrounding this alleged action were undisputed.

The Court should deny this writ because the undisputed circumstances surrounding any strike by Harman undercut a claim of conflict between the Fourth Circuit and the Second and Third Circuits. Petitioners do not demonstrate that the Fourth Circuit acted contrary to this Court's precedent in *Graham v. Conner*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), or that there is a lack of clarity for deciding cases such as this one. The Fourth Circuit properly found that there was no constitutional violation even if Office Harman struck Cox. This Court has reserved this question of law to the judge on summary judgment where, as here, no material dispute of fact regarding the application of force exists.

I.

THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH OTHER CIRCUITS ON THE SAME IMPORTANT MATTER.

Petitioners contrive an argument that the Fourth Circuit has acted inconsistently with the Second and Third Circuits in its ruling, and that this Court should take jurisdiction to resolve a conflict among the circuits. Petitioners argue that the Second and Third Circuits have better apportioned the roles between judge and jury by sending the issue of objective reasonableness to the jury. The facts of this case are very different from those at the summary judgment stage in *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999) and *Breen v. Garrison*, 169 F.3d 152 (2d Cir. 1999).[9] There is no conflict.[10]

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9. Petitioners' citation to cases in other circuits in their footnote 2 is similarly unhelpful. Pet. 13-14. Respondents particularly note that the First Circuit's opinion in *St. Hilaire v. City of Laconia upheld* a district court grant of summary judgment. 71 F.3d 20 (1st Cir. 1995)

10. Furthermore neither of these courts had the benefit of the later decision of this Court in *Saucier v. Katz*, __ U.S. __, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). If anything, the Third Circuit analysis in *Abraham*, differs with this Court in *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) and *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) to the extent that it suggests that more cases involving excessive use of force should be determined at trial instead of being resolved on motion where as a matter of law there is no constitutional violation, where there is no issue of material fact in genuine dispute, or where qualified immunity applies. If the Second and Third Circuits (Cont'd)

Petitioners argue that *Abraham* dictates that "reasonable inquiry should be left to the jury in most cases." Pet. 13 and 15. The Court in *Abraham* only said that cases in which there is a question of reasonableness "frequently" go to the jury to determine how specific circumstances would affect an officer's judgment. *Abraham* at 290. That court called it a "sensitivity to context." *Id.* Unlike in *Abraham*, however, the parties know and agree to the context in which the Officers were functioning in the instant case. Petitioners just want a different decision.

In *Abraham* there was a strong disagreement as to the context of the officer's claim of the need to use deadly force. The court found enough physical evidence to cast doubt on the officer's testimony that she was at risk of being hit by the decedent's car and that Abraham posed an immediate threat of physical harm to her or the public. 183 F.3d 279. "Relying on various pieces of physical evidence, the estate argues that the officers inflated the damage to the Mustang and hence the speed Abraham was driving, and the estate maintains that cars were not parked immediately beside Abraham's car as Raso suggested." 183 F.3d at 285. A proper reading of the physical evidence, the estate argued, deflates the charge that Abraham was driving recklessly and threatening lives. More importantly, physical evidence showed that Raso's shot went through the driver's side window, not the front windshield, as Raso claimed in her statement on October 31, 1994. 183 F.3d 284. Autopsy

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have misunderstood or applied this Court's instructions in its previous rulings, the court should not use this case to address them. Also the conclusion from *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), does not apply (Pet. 20). In the instant case there was no conflict in evidence about the nature of the threat which the Officers faced or in the factual sequence since the Fourth Circuit assumed facts in favor of Cox.

photos supported plaintiffs' version of the facts and bystanders saw the female officer to the side not the front of the car. *Id.* at 285. The Third Circuit was concerned that physical evidence together with inconsistencies in the officer's testimony raised credibility determinations that could not be made on summary judgment. 183 F.3d at 294.

Extensive discovery in the instant case revealed no equivalent physical evidence or inconsistencies concerning the Defendant officers' announcements and other verbal attempts to arouse Cox prior to the application of any force to his foot.[11] Here by contrast, the Fourth Circuit affirmed summary judgment that the officers' use of force was reasonable precisely because it was undisputed that such force was applied only after the Officers made repeated unsuccessful verbal attempts to rouse Cox during the investigation of a suspect burglary in progress. Pet. App. 10a. These circumstances were truly undisputed from Petitioners' responses to requests for admission as well as the uncontroverted statements of the Officers. *See* JA 195, 221-22.[12] In their Statement of the Case here, Petitioners again concede that: (1) Defendant officers were investigating a burglary in progress and (2) that the officers made repeated verbal attempts to rouse Cox, including from inside the bedroom. *See* Pet. 4-6.

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11. One can reasonably question whether this act can be described as "force" in the routine sense. The Officers only stated that Officer Harman may have touched or tapped Cox's foot by a slow methodical movement. JA 214, 264, 672-73.

12. Petitioners admitted in their responses to requests for admissions that Cox made no response to the officers even though a police canine barked less that two feet from Cox's head. JA 195-196.

No physical evidence contradicted that Cox's failure to respond to repeated warnings and announcements. No evidence supports Petitioners' assertion that Officer Harman struck Cox's foot with excessive force under the circumstances. As set forth above, assuming a bruise, caused by Harman — and not by one of Cox's other evening activities — Respondents' medical expert opined that the amount of force necessary to cause such a bruise would have been mild or moderate, *at most*. JA 652-53. Not even a scintilla of evidence supported Plaintiffs' assertions and the Fourth Circuit was exceedingly generous in assuming for the purpose of its opinion that there was at all. P. 10, *supra*.

The court of appeals in *Abraham* examined the circumstances just before Raso shot, i.e. the side or front of the car, the space between the cars, the degree to which Abraham was driving recklessly. In doing so the Court used the same analysis as the Fourth Circuit in the instant case: that the use of force must be reviewed in the totality of circumstances, and relate to the circumstances existing a moment before the force is applied, not to those that 20-20 hindsight shows to have later unfolded.[13]

One similar fact between *Abraham* and this case is that the decedent would have been a witness if he had not died. Petitioners call upon the *Bazan v. Hildago County* decision to state that the testimony of interested witnesses should be viewed skeptically, as a self-serving account.[14] Pet. 17; 246 F.3d 481, 492 (5th Cir. 2001).

13. The Fourth Circuit is not among the circuits that disregard pre-seizure conduct — here pre-seizure conduct was examined by the Fourth Circuit as it was in *Abraham*, pre-seizure conduct of both officers and Cox was undisputed. The officers made announcements as part of a suspected burglary in progress and Cox did not respond.

14. Petitioners cite *Scott v. Henrich* for the same reason but in that case the court only indicated that courts on summary judgment

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Importantly, *Bazan* does not hold that the court cannot use a "self-serving account" but only that it must be scrutinized and looked at it with particular care. *Id.* The Fourth Circuit did so here; all material facts regarding the application of any force were agreed to, and where there was a significant difference (as with respect to the existence of a bruise or whether Cox was sleeping) the court chose the non-moving parties' version.[15]

The Second Circuit in *Breen v. Garrison*, reversed a trial court determination of summary judgment because the parties' versions of the material facts, regarding the amount of force and extent of injuries, differed markedly on these issues. 169 F.3d 152, 153 (2d Cir.1999). Breen alleged that, during a proceeding before a magistrate on a traffic violation, the trooper jumped on his back and yanked his head and neck; pushed his face into the table; intentionally tightened the handcuffs; hit him and spit in his face. The decision in *Breen* makes no sweeping statement about the role of the court at summary judgment. It simply states that the "parties' versions of the material facts differ markedly on these issues" and precludes summary judgment on the defense of qualified immunity. *Breen* at 153.

By contrast, in the instant case there is no dispute on the material facts. The Fourth Circuit assumed, as alternative grounds for affirming the district court grant of summary judgment, that

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should be cautious, not that summary judgment should be denied, when the person who was subjected to a use of force is not available to testify. 39 F.3d 912, 915 (9th Cir. 1994).

15. Again, this was a gift to the Petitioners because there really was no credible evidence of a bruise, but only of a bluish discoloration in a Polaroid photograph.

Officer Harman hit Cox hard enough on the foot to cause a bruise. Discovery had revealed no injury to Cox prior to the moment he pointed a rifle at Officer Ford and the Officers shot him in self-defense. There was no dispute as to the amount of force that would be necessary to cause a small bruise. The Fourth Circuit also had undisputed circumstances prior to Harman's action: Cox was unresponsive while the Officers were conducting an investigation of a suspected burglary in progress, giving numerous and loud warnings both outside the house and inside, including in Cox's bedroom.

Separate from *Abraham* and *Breen*, Petitioners cite *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994) and *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), for their conclusion that Officers Ford and Harman provoked a use of deadly force. Again neither case stands for a proposition which is useful in the analysis of the instant case because of the dramatic differences in the facts available to the respective courts at the summary judgment stage. *Rowland* involved a scuffle arguably initiated by a police officer on a citizen over a lost $5 bill. 41 F.3d at 174. The investigation of a suspected burglary in progress and attempts to arouse a non-responsive person (Cox) are very different from the facts presented in *Rowland*. Importantly, Rowland did not involve a split second judgment regarding the use of deadly force in response to a deadly threat.

Petitioners ignore that *Rowland v. Perry* demonstrates that the Fourth Circuit will let an excessive use of force case go to the jury when there is some evidence to support Plaintiff's version of a case and, when the court has determined that no reasonable officer could have believed his conduct to be lawful in light of the circumstances. *Id.* It should also be noted that the Second Circuit in *Abraham v. Raso* cites *Rowland* for the premise of looking at all of the circumstances in evaluating objective reasonableness. *Abraham* at 292.

Furthermore, unlike in *Sledd*, where the Court of Appeals found a failure to knock and give an announcement before the police battered down plaintiff's door, the Officers here gave three warnings before entering the Cox house with canine and numerous announcements thereafter, including right next to Cox. Pet. 5; JA 211-12, 223. Also, unlike in *Sledd*, where the officers were not carrying visible insignia, the Officers here clearly made themselves known as police officers. Pet. 5; JA 192, 209-214, 218-222, 226-228.

The Fourth Circuit is not in conflict with the Second or Third Circuits in holding that the application of mild or moderate force under the circumstances presented here is objectively reasonable, there being no facts from which a reasonable juror could find for the plaintiff. Petitioners postulate without support that a decision by the Supreme Court in this case would affect a large number of cases regarding excessive force. Pet. 4. Petitioners would have this Court adopt a standard contrary to the established precedent and a rule that cases involving mere speculation should go to trial. This Court has a long precedent of stating that — for the public good — such cases should not go to trial. Respondents should be spared, not only unwarranted liability, but also the unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit. *Wilson v. Layne*, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 827, 119 S. Ct. 1692 (1999), quoting *Siegert v. Gilley*, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991).

II.

THE FOURTH CIRCUIT HAS NOT ACTED CONTRARY TO THIS COURT'S PRECEDENT, INCLUDING *GRAHAM v. CONNER*

No conflict exists between the Fourth Circuit analysis in this case and that of this Court.

A. The Fourth Circuit Correctly Found That the Alleged Use of Force Did Not Violate a Recognized Constitutional Right.

Even if Petitioners did not concede that the use of deadly force by Officers Ford and Harman was reasonable once Cox pointed a rifle at Officer Ford and refused to drop it after warning by Ford, *Tennessee v. Garner* dictates that the Officers had a right to protect themselves from this undisputed threat of death or serious injury. 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985). Petitioners concede that the officers' use of force in shooting Cox once he pointed a rifle at Officer Ford was justified. This application of force clearly is objectively reasonable under *Graham v. Conner*. 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).

The alleged use of force by Officer Harman to touch or strike Cox's foot prior to the shooting was non-deadly force. The Fourth Circuit appropriately considered first whether this act violated a clear constitutional right and concluded properly that it did not. Based on this Court's recent decision in *Saucier v. Katz*, this is the first query that must be addressed as a matter of law by the judge not jury. __ U.S. __, 150 L. Ed. 2d 272,

121 S. Ct. 2151 (2001).[16] Petitioners have at no time identified to this or any other court what right of Cox was violated.[17] They have simply referenced the Fourth Amendment. They cite no law or opinion of this court or otherwise that would indicate to Officers Harman and Ford under these circumstances that they could not have attempted to rouse or ascertain the condition of an unresponsive person during their investigation of a burglary by applying mild or moderate force to the person's foot. This court in *Saucier* held that only after making a determination that a clear constitutional right has been violated should further inquiry be made as to whether the actions of the officers in using force were objectively reasonable. 150 L. Ed. 2d 272.

Petitioners never posit how the Fourth Circuit failed to follow the criteria in *Graham v. Conner*. The Fourth Circuit, mindful of the direction of this court in *Graham*, conducted a Fourth Amendment analysis.[18] The Court of Appeals analyzed the actions

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16. Petitioners footnote *Williams v. Bramer*, 180 F.3d 699 (5th Cir. 1999) and *Medina v. Cram*, 252 F.3d 1124 (2001). Pet. App. 20. The import of these cases to Petitioners' argument is unclear since they clearly indicate that whether a constitutional violation has occurred is solely a question of law which must first be established; a premise which neither the Fourth Circuit nor Respondents dispute. The court in *Medina* also cites to this court's opinions that the "purely legal question" raised by a qualified immunity defense should be resolved at the earliest possible stage of litigation.

17. *See Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 530, 107 S. Ct. 3034 (1987).

18. The court indicated that because it found no violation of the Fourth Amendment and declined to reach the issue of qualified immunity that it not need to address whether the tests for qualified immunity and reasonableness merged, which was before this Court in *Saucier*.

of Officers Harman and Ford in the context of "circumstances that are tense, uncertain, and rapidly evolving." Pet. App. 9a, citing *Graham* at 397.[19] It rejected the specific armchair analysis that Petitioners seek here and judged reasonableness, as directed by *Graham*, "from the 'perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight.' " Pet. App. 9a, citing *Graham* at 396.

The Fourth Circuit held that the touching of Cox's foot was appropriate to ascertain Cox's condition.[20] It concluded that the Officers' use of deadly force was a response to an immediate and serious threat to their safety and reasonable under the standard set forth in *Graham*. Pet. App. 11a. Applying this standard, it found that even if one assumed Harman struck hard enough to cause bruise, his actions were objectively reasonable. The Fourth Circuit, therefore, properly noted that it could not conclude that "striking Cox on the foot to provoke a reaction was unreasonable under the circumstances." Pet. App. 10a.[21] The Court of Appeals was, therefore, making precisely the

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19. Petitioners' speculation about the "alleged" bruise incident should not cloud the salient legal issue that Officers Ford and Harman were faced with an impossible choice that had to be made in a "flickering of an instant." *McLenagan v. Karnes*, 27 F.3d 1002, 1009 (4th Cir. 1994).

20. Petitioners complain that the Fourth Circuit conclusion rested on its determination that there was no constitutional violation and, therefore, did not address the issue of qualified immunity. Pet. 12.

21. Notably, the relative use of force allegedly employed in the instant case and single bruise injury pales compared to the application of force utilized by the police officers on a man that they later determined to be a diabetic who had committed no crime in *Graham v.Conner*, resulting in multiple injuries. 490 U.S. 386, 390, 104 L. Ed. 2d 443, 451.

determination required by *Graham* when it stated, "we can't conclude that striking Cox to provoke a reaction was unreasonable." such as to constitute a constitutional violation. Pet. App. 10a.

Petitioners fault the Fourth Circuit for assuming the bruise and not inquiring further as to whether there were reasonable alternative actions which the Officers might have taken. They cite no fact to indicate that the use of other alternatives was appropriate in light of the Officers' uncertainty as to Cox's identity. *See* Pet. 21. They cite no law that establishes as a general matter that it is a constitutional violation not to follow a particular police procedure.[22] This court in *Graham v. Conner* did not set forth a standard which would compel police to do so, in fact it discourages such Monday morning quarterbacking or the use of 20-20 hindsight to evaluate police actions. 490 U.S. 386, 396-7, 104 L. Ed. 2d 443, 455-6.

Petitioners trivialize the tense and uncertain circumstances of investigating a suspected burglary in progress in a townhouse and encountering of a non-responsive half-dressed individual. They suggest that the Officers should have taken an armchair to review courses of action. Pet. 18, 21. They are either naïve or make a mockery of the exigencies of police work. The absurdity of this suggestion is self-evident from Cox suddenly pulling a *concealed* rifle from under the covers and pointing it at Officer Ford.

Petitioners infer that *Graham* requires a jury and not the judge to determine whether an officer's actions are objectively reasonable. This Court did not deal with that issue in *Graham*. To the contrary, on several occasions, this Court has pointed to

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22. *See Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994).

the public policy aspects of resolving issues of qualified immunity long in advance of trial, at the earliest possible stage in litigation. *Hunter v. Bryant*, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 595, 112 S. Ct. 534 (1991); citing *Anderson v. Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).[23] Qualified immunity is an entitlement not to stand trial, not a defense from liability. *Saucier v. Katz*, 121 S. Ct. 2151, 2156, citing *Mitchell v. Forsythe*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). This court noted in *Behrens v. Pelletier* that "*Harlow* [*v. Fitzgerald*] adopted this criterion of 'objective legal reasonableness,' rather than good faith, precisely in order to 'permit the defeat of insubstantial claims without resort to trial.' " 516 U.S. 299, 306, 133 L. Ed. 2d 773, 783, 116 S. Ct. 834 (1996).

It should finally be noted that Petitioners conceded in their brief to the Fourth Circuit that there is no derivative liability for Respondents Lt. Schaul, Chief Deane and Prince William County where there is no underlying constitutional violation. Plaintiffs' Brief 53-55.

B. The Fourth Circuit Correctly Found that There Was No Genuine Issue of Material Fact in Dispute to Send the Matter to a Jury.

The Court of Appeals found that mere speculation or the building of one inference upon another is insufficient to create a genuine issue of material fact and, therefore, summary judgment for Respondents was appropriate. Pet. App. 7a and 10a.

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23. "Our cases establish that qualified immunity shields agents . . . from suit for damages if 'a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly establish law and the information the [arresting] officers possessed.' "

This court has made clear that if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202 (1986). The mere existence of a scintilla of evidence in support of a non-moving party's position is insufficient for the case to proceed to a jury; there must be evidence upon which a jury could find by a preponderance for that party. 477 U.S. at 252, 91 L. Ed. 2d at 214.

Petitioners claim that a finder of fact could have disbelieved the Officers and found their conduct unreasonable. But this assertion is fallacious because: (1) even if one disbelieves the Officers, the bruise is still only a small injury caused by mild or moderate force, at most; (2) the circumstances surrounding the application of this mild or moderate force were undisputed; and (3) they would have the jury apply a 20-20 hindsight of the police using different procedures. Finally, Petitioners give no rational alternative to shooting Cox once he presented the undisputed threat with a rifle and refused to drop it.

Speculation alone should not be a reason to so burden the public. A matter should not be sent to a jury to allow a Plaintiff to place inference upon inference in hopes that it can get lucky in confusing a jury. This Court should, therefore, not further prolong this matter. Consistent with this Court's dictates in *Anderson*, this Court should remove the cloud of this litigation from these Officers and the public body and deny the writ.

CONCLUSION

The Fourth Circuit's ruling was in accord with this Court's precedent and not in conflict with decisions from the Second and Third Circuits. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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No. 01-389

In the Supreme Court of the United States

JOAN H. COX, Individually, and as Widow and Personal Representative of the Estate of Brian J. Cox, deceased; and as Mother and Legal Guardian of Brian Justin-Tyler Cox, a minor,

Petitioner,

v.

COUNTY OF PRINCE WILLIAM; CHARLIE T. DEANE, Individually and as Chief, Prince William County Police Department; JAMES FORD, Individually and in his Official Capacity as a Police Officer; MARK J. HARMAN, Individually and in his Official Capacity as a Police Officer; ROBERT C. SHAUL, Individually and in his Official Capacity as a Police Officer,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. Introduction

Respondents refuse to focus on the narrow issue presented by the petition—whether it is the judge or the jury who determines the objective reasonableness of an officer's conduct where reasonable minds could differ on that subject. Instead, respondents focus primarily on re-arguing their version of the events surrounding the killing of Mr. Cox. To the extent that respondents do address the issue raised in the

petition, their opposition serves only to highlight the conflict between the ruling below and decisions from other circuits regarding the proper decision-maker to determine the reasonableness of an officer's use of force. This is an important issue that affects every case involving allegations of use of excessive force by police. The Court should grant review to resolve the conflict over who decides whether an officer's conduct is reasonable where reasonable minds could differ—the jury, as the Second and Third Circuits have held, or the judge, as the court of appeals has permitted in the decision below.

B. As In *Abraham* And *Breen*, A Reasonable Juror Could Conclude That The Officers Used Excessive Force.

This case presents precisely the kind of situation in which "physical evidence together with inconsistencies in the officer's testimony raise[ ] credibility determinations that [can]not be made on summary judgment." *See* Br. in Opp. 12; *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999); *Breen v. Garrison*, 169 F.3d 152, 153 (2d Cir. 1999). Although respondents spend much of their brief arguing that the facts are undisputed, they acknowledge that the parties differ on some "significant" issues. *See* Br. in Opp. 5-8, 14. Indeed, given the facts—the officers themselves have admitted that Harman made physical contact with Mr. Cox's foot, a bruise was found on Mr. Cox's foot afterward, Mr. Cox had remained totally unresponsive to all police announcements and a barking police dog until Harman struck his foot, after which he awoke screaming, and the officers killed the only witness likely to contradict their testimony—it is difficult to imagine how any plaintiff would survive summary judgment without a surviving eyewitness in an excessive deadly force case if the evidence here is held insufficient as a matter of law to permit a reasonable jury to infer that the officers used unreasonable force.

Significantly, respondents do not dispute that the principles announced in *Abraham* and *Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001), are applicable to this case. *See* Br. in Opp. 13-14. These decisions require a court to examine "the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably" in deadly force cases to " 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.' " *Abraham*, 183 F.3d at 294 (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)); *Bazan*, 246 F.3d at 492. Respondents' acceptance of these principles undermines their repeated complaints regarding the sufficiency of petitioner's proof, as respondents essentially acknowledge that the courts below were obliged to credit petitioner's view of the evidence. Br. in Opp. 14. This admission demonstrates that the issue decided by the court of appeals was parallel to that addressed by the Third Circuit in *Abraham*, although the courts reached very different conclusions.

To be sure, respondents have a different view of the facts, but this does not defeat the inference raised by petitioner's proof at the summary judgment stage that Officer Harman used excessive force in striking Mr. Cox's foot with enough force to cause a bruise. This inference is even more appropriate in light of the officers' inconsistent recollections and the fact that the jury would hear testimony detailing Harman's history of untruthfulness.[1] *See Bazan*, 246 F.3d at 492 (noting that the court must critically assess the evidence in deadly force cases "to decide whether the officer's

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[1] This testimony could be presented to the jury through cross-examination under Federal Rule of Evidence 608(b) or under Federal Rule of Evidence 404(b) to prove the County's knowledge of Harman's untruthful and violent nature.

testimony could reasonably be rejected at a trial" because the defendant "knows that *the only person likely to contradict him or her is beyond reach*") (emphasis in original); *Abraham*, 183 F.3d at 294 (same). The factual issues surrounding the credibility of the officers' testimony, the amount of force used, and the reasonableness of the force are the identical issues addressed by the Third and Second Circuits in *Abraham* and *Breen*, but, in contrast to those courts, which properly reserved these issues for the factfinder, the court of appeals here endorsed the district court's approach of deciding them all as a matter of law.

Respondents misdirect the relevant inquiry when they assert repeatedly that petitioner "concedes" that the officers were justified in killing her husband when he rose from the bed with a gun after the blow to his foot startled him from his sleep. Br. in Opp. 5, 8, 17. If the officers' conduct in striking Mr. Cox's foot is held unreasonable, the factfinder could well determine that the resulting use of deadly force, which was set in motion by the officers' initial use of excessive force, was itself unreasonable. Pet. 19 n.3. Respondents attempt to distinguish *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994), and *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), but they fail to explain how the factual differences detract from the essential principle, applicable here, that the police may not unreasonably create a situation that then necessitates their use of excessive force. *Graham v. Connor*, 490 U.S. 386, 396 (1989), and its progeny do not permit respondents to concentrate only on that portion of the sequence of events that they regard as most readily defensible; rather, *Graham* instructed courts to examine the "totality of the circumstances" leading up to the use of deadly force.[2]

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[2] In an effort to show that the court below has reached results similar to the decisions in *Abraham* and *Breen*, respondents assert that *Rowland* "demonstrates that the Fourth Circuit will let an excessive force case go to

C. The Fourth Circuit's Decision Cannot Be Reconciled With *Abraham* And *Breen*.

The Fourth Circuit improperly removed the "reasonableness" inquiry from the jury, in stark contrast to the approach adopted by the Second and Third Circuits. *Compare* Pet. App. 10a (concluding, as a matter of law, that striking Cox was reasonable because Cox "remained unresponsive" to police commands), *with Abraham*, 183 F.3d at 290 ("since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared"), *and Breen*, 169 F.3d at 153 ("The issue of excessive force also was for the jury, whose unique task it was to determine the amount of force used, the injuries suffered and the objective reasonableness of the officer's conduct.").

Respondents' effort to distinguish *Abraham* is belied by respondents' own admissions that the parties disagree as to the critical circumstances surrounding the striking and bruising of Mr. Cox's foot. Br. in Opp. 11, 14. Contrary to respondents' assertion, (Br. in Opp. 11), the context of those crucial moments before Harman struck Mr. Cox's foot is very much in dispute. Petitioner has adduced evidence that

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the jury when there is some evidence to support Plaintiff's version of a case . . . ." Br. in Opp. 15. In *Rowland*, however, the defendant officer essentially acknowledged that his version of the facts differed significantly from that of the victim in almost every respect, including whether the suspect attempted to give the lost money back to the woman who dropped it, whether the suspect initially ran from the officer, whether the officer or the suspect initiated the use of force, the nature of the suspect's resistance, the suspect's subsequent attempts to flee, and the amount of force used. *See Rowland*, 41 F.3d at 171-73. Here, of course, respondents' actions rendered the victim incapable of testifying. That does not mean that the reasonableness of the officers' conduct should be determined by the court rather than a jury.

Harman, only seconds after entering Mr. Cox's bedroom, grew impatient and struck the sleeping man with enough force to cause tissue damage, and contrary to accepted police procedure. Respondents claim that Mr. Cox's foot, if struck at all, was merely "tapped" lightly to rouse him. Br. in Opp. 6. A reasonable jury could well conclude that it was an unreasonable use of force to strike a man in his own home as he slept, posing no threat to the officers or others, when numerous reasonable alternatives were available to the officers to safely determine the identity of the man and his condition. *See Abraham*, 183 F.3d at 292; Pet. 9-10.

It is no answer for respondents to assert that their conduct was reasonable because the bruise that resulted was "small." Br. in Opp. 15. Under *Graham*, the reasonableness of the amount of force used must be analyzed under the "totality of the circumstances," 490 U.S. at 396, and it is well established that a bruise can constitute an injury sufficient to withstand summary judgment on an excessive force claim. *See Lambert v. City of Dumas*, 187 F.3d 931, 936 (8th Cir. 1999); *Alexis v. McDonald's Restaurants, Inc.*, 67 F.3d 341, 353 (1st Cir. 1995); *cf. Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994)(declaring that "a plaintiff is no longer required to prove significant injury to assert a § 1983 Fourth Amendment excessive force case," but deciding case under prior law). The decisions in *Abraham* and *Breen*, as opposed to the ruling below, recognize that these determinations of reasonableness are best made by the jury. 183 F.3d at 290-94; 169 F.3d at 153.

The court of appeals here largely ignored the guidance of this Court in *Graham*, which was explored at length in the *Abraham* decision. The court of appeals did not mention or analyze a single factor that this Court identified in *Graham* as requiring "careful attention" in excessive force cases, *i.e.*, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade

arrest by flight." *Graham*, 490 U.S. at 396. In this regard, respondents' assertion that it is "irrelevant" whether the officers knew that Mr. Cox was the homeowner at the time of the incident is particularly revealing. Br. in Opp. 8. It shows that the officers were not considering any reasonable alternatives to their actions to protect an innocent homeowner who they knew might be in the house.

Respondents attempt to deal with *Graham* by jumping ahead in time to the moment when Mr. Cox raised the rifle from the bed. *See* Br. in Opp. 17, 20. This argument misses the point. During the relevant time period—the period when the police were faced with the sleeping Mr. Cox—a simple check of the unresponsive, unmoving man's hands would have revealed that the rifle was in the bed so that it could have been harmlessly removed. JA 553. The "cover and control" method, which was described by the retired Commissioner of the New York Police Department and other leading experts as the standard of care, also could have neutralized this threat. Pet. 9-10, 18-19; JA 550-53. On entering the bedroom, the officers were confronted with a static situation; nothing happened until Harman aggresively struck Mr. Cox's foot, setting in motion the tragic events that led to Mr. Cox's death. The court of appeals' lack of attention to these factors shows that it hardly reviewed the "totality of the circumstances," as directed by this Court and as the Third Circuit did in *Abraham*. Pet. App. 8a-11a; *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)); *Abraham*, 183 F.3d at 289, 291-92.

Respondents' failure to recognize the conflict among the circuits on the constitutional question stems at least in part from their confusion over the way in which that issue relates to the qualified immunity defense. For example, respondents, contend that the Third Circuit decision in *Abraham* "differs" from the decisions of this Court in *Hunter v. Bryant*, 502 U.S. 224 (1991), and *Anderson v. Creighton*, 483 U.S. 635 (1987).

Br. in Opp. 10 n.10. Those decisions, however, dealt with the qualified immunity defense to 42 U.S.C. § 1983 liability, which was never raised or addressed in *Abraham*. *Abraham* dealt solely with the constitutional issue of whether the amount of force that the officer used was reasonable. *See Abraham*, 183 F.3d at 287-96. Addressing the identical issue of "reasonableness" that the *Abraham* court decided should go to the jury, the court below specifically refrained from determining the qualified immunity questions and rested its decision solely on the basis that no constitutional violation had occurred (*i.e.*, that the officers use of force was reasonable as a matter of law). Pet. App. 4a n.*, 11a.

Similarly, respondents attempt to derive support from this Court's recent decision in *Saucier v. Katz*, 121 S. Ct. 2151 (2001), which clarified the qualified immunity inquiry. Br. in Opp. 17-18. Respondents' misunderstanding of *Saucier* and the framework for analyzing § 1983 claims where the qualified immunity defense is raised is apparent. Respondents confuse the requirement that a plaintiff show that the officers' conduct violated "clearly established" law with the constitutional inquiry at issue here.

This Court made clear in *Saucier* that the first step in the inquiry is to determine whether the facts, "taken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right." *Saucier*, 121 S. Ct. at 2156. If a violation can be discerned on a favorable view of the evidence, then the court is to consider "whether the right was clearly established." *Id.* This Court explained that "there is no doubt that *Graham v. Connor, supra,* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Id.* The question whether respondents' use of force was unreasonable and excessive under this standard is the only issue decided below. The question whether respondents violated "clearly

established" law has not yet been reached. The error in respondents' attempted reliance on *Saucier* is exposed by the court of appeals' own statement that it was not deciding the issues addressed in this Court's decision. Pet App. 4a n.*, 11a.

Stripped of its rhetoric and sarcasm, respondents' position boils down to this: it was proper for the Fourth Circuit to decide that the officers' bruising blow to Mr. Cox's foot while he lay unresponsive, posing no threat, in his own bed was reasonable as a matter of law because Mr. Cox was unresponsive to police announcements. This position is both illogical and irreconcilable with decisions of other courts of appeals. The Second and Third Circuits, following this Court's lead in *Graham*, have determined that the jury is best suited to make the fact-sensitive reasonableness inquiry in this kind of case. Just as in *Johnson v. Jones*, 515 U.S. 304 (1995), *Wilson v. Layne*, 526 U.S. 603 (1999), and *Graham* itself, review should be granted to resolve a split in the lower courts and to address an important issue that will affect a large number of cases involving Fourth Amendment claims against police officers.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

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